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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1510

JACK M. WEATHERFORD, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN AGENT OF THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION, PETE STROM, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHIEF OF THE SOUTH CAROLINA STATE LAW ENFORCEMENT DIVISION; AND OTHER UNKNOWN AGENTS AND OFFICIALS OF THE SOUTH CAROLINA STATE LAW ENFORCEMENT DIVISION,

PETITIONERS,

versus

BRETT ALLEN BURSEY,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH DISTRICT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions and Statutes Involved	2
Statement	3
Reasons for Granting the Writ	5
Conclusion	13
Appendix	15

CITATIONS

Cases: PAGE

Black v. United States, 385 U. S. 26 (1966) 8

Brady v. Maryland, 373 U. S. 83 (1963) 2, 10

Caldwell v. United States, 205 F. (2d) 879 (D. C. Cir. 1953), cert. den. 345 U. S. 930 (1955) 7

Coplon v. United States, 191 F. (2d) 749 (D. C. Cir. 1951), cert. den. 342 U. S. 926 (1952) 7

Hoffa v. United States, 385 U. S. 293 (1966) 7

O'Brien v. United States, 386 U. S. 345 (1967) 8

United States v. Rispo, 460 F. (2d) 965 (3d Cir. 1972) 7

Statutes and Regulations:

42 U. S. C. § 1983 .....3, 4, 12

Miscellaneous:

VIII Wigmore, Evidence § 2292 (McNaughton rev. 1961) 7

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BRETT ALLEN BURSEY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH DISTRICT

The South Carolina Attorney General, on behalf of the above-named petitioners, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on December 2, 1975.

OPINIONS BELOW

The opinion of the District Court for the District of South Carolina granting judgment for the defendants Weatherford, *et al.*, is printed in Appendix B hereto. The opinion of the Court of Appeals of the Fourth Circuit,

which reversed and remanded the judgment of the District Court for the District of South Carolina, is printed in Appendix A hereto and is not yet reported in the official reports.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was made and entered on December 2, 1975. The petitioners' Petition for Rehearing and Motion for Rehearing En Banc was denied by the Court of Appeals for the Fourth Circuit on January 19, 1976. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the mere presence of an undercover agent during a defendant's conversation with his counsel constitutes a *per se* violation of the Sixth Amendment right to effective assistance of council.

2. Whether the concealment of an undercover agent's identity until he testifies against a defendant violated that defendant's right to a fair trial and also violated the principles of *Brady v. Maryland*, 373 U. S. 83 (1963).

3. Whether the findings of the district courts as to *respondeat superior* were clearly erroneous.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The fifth, sixth and fourteenth amendments to the United States Constitution and 42 U. S. C. 1983 are involved in this petition for a writ of certiorari.

STATEMENT

This suit arises under 42 U. S. C. § 1983. The basic facts are as follows:

On July 27, 1970, the plaintiff was tried and convicted by a jury of the crime of malicious destruction of property occupied by the Richland County Selective Service Board.

On the night of March 19, 1970, as a part of demonstrations connected with "National Anti-Draft Week" the respondent, the petitioner Weatherford and one or two others went to the office of the Richland County Selective Service Board in Columbia, South Carolina, where a brick was thrown through a window, and red paint was sprayed and splattered on the inside and outside of the building. Attached to the brick as a note attacking the Selective Service System and the war in Vietnam.

Some months prior to March, 1970, petitioner Weatherford was employed by SLED as an undercover agent. At that time he was attending the University of South Carolina and became acquainted with the respondent Bursey through an organization known as "AWARE," which was a group on the University Campus formed to discuss the need for social change and opposition to the war in Vietnam.

On the morning of March 20, 1970, Bursey and Weatherford were arrested after Weatherford had advised SLED agents of the participation by Bursey and Weatherford in the activities at the Selective Service Board Headquarters. Following the arrest, Bursey and Weatherford were taken to the Richland County Jail, where they were booked, charged with the offense and placed in separate cells. At the time of their arrest, they were handcuffed together and Weatherford suggested that they keep silent and seek legal counsel.

Shortly after release, Bursey employed C. Rauch Wise of Greenwood to represent him in connection with the criminal charges. Following his release from prison, petitioner Weatherford continued to act as an undercover agent in the employment of SLED and was engaged in investigating activities and seeking information regarding law violations not only in Columbia but in other South Carolina cities. During this time he remained on the payroll of SLED and made most of his reports to Lt. Ronald Cooper; he rarely had any contacts or dealings directly with petitioner Strom.

On two occasions following the employment of Bursey's attorney, said attorney, Bursey and Weatherford met and the approaching trial was discussed. On neither of these occasions did Weatherford seek information from Bursey or his attorney, and on neither occasion did he initiate or ask for the meeting. He was brought into the meetings by Bursey and Bursey's attorney in an effort to obtain information, ideas or suggestions as to Bursey's defense.

Neither following the various meetings with Bursey and/or Bursey's attorney nor at any other time did Weatherford discuss with or pass on to petitioner Strom, any agents of SLED, or to Solicitor John Foard and/or any of his staff any details or information regarding Bursey's trial plans, strategy or anything having to do with the criminal action pending against Bursey. Until the morning of the 27th of July, 1970, Weatherford did not know he would be used as a witness in the criminal action and Solicitor Foard had not decided, until just prior to the call of the case, that he would use Weatherford as a witness. Weatherford testified at a trial of Bursey and the jury found Bursey guilty.

Thereafter on July 2, 1973, respondent Bursey, under 42 U. S. C. 1983, filed a complaint against the petitioner

alleging violations of Bursey's rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The District Court for the District of South Carolina on August 20, 1974, entered judgment for the petitioner because there were no facts to support the respondent's allegations that his constitutional rights were, in fact, violated by the mere presence of Weatherford. The Court of Appeals for the Fourth Circuit reversed the judgment of the District Court holding *inter alia* that any intrusion by Weatherford into Bursey's attorney-client relationship constituted a *per se* violation of Bursey's constitutional rights.

REASONS FOR GRANTING THE WRIT

This petition raises substantial questions concerning the administration of criminal justice in the federal courts and the administration of effective law enforcement by state officials. The decision below should be reviewed because it decided constitutional questions in conflict with applicable decisions of this Court. The conflicting decisions among the circuit courts concerning the use of undercover agents upon an individual's sixth amendment right to effective assistance of counsel should also be resolved by this Court.

I

The Court of Appeals held that there was a *per se* violation of respondent's rights under the sixth amendment. The Court of Appeals found an unconstitutional intrusion upon the confidentiality of the lawyer-client relationship protected by the sixth amendment. The findings of fact in this area are important and are summarized as follows:

> Petitioner Weatherford remained an undercover agent after the arrest of both himself and Respondent Bursey; by staying undercover Petitioner Weatherford

thereby remained in the confidence of Respondent Bursey. Shortly after release, Bursey employed C. Rauch Wise of Greenwood to represent him in connection with the criminal charges. Following his release from prison, petitioner Weatherford continued to act as an undercover agent in the employment of SLED and was engaged in investigating activities and seeking information regarding law violations not only in Columbia but in other South Carolina cities. On two occasions following the employment of Bursey's attorney, said attorney, Bursey and Weatherford met and the approaching trial was discussed. On neither of these occasions did Weatherford seek information from Bursey or his attorney, and on neither occasion did he initiate or ask for the meeting. He was brought into the meetings by Bursey and Bursey's attorney in an effort to obtain information, ideas or suggestions as to Bursey's defense. Neither following the various meetings with Bursey and/or Bursey's attorney nor at any other time did Weatherford discuss with or pass on to petitioner Strom, any agents of SLED, or to Solicitor John Foard and/or any of his staff any details or information regarding Bursey's trial plans, strategy or anything having to do with the criminal action pending against Bursey.

One of the important points of the findings of fact summarized above is that Respondent Bursey and his attorney, without any solicitation, invited Petitioner Weatherford into conversations with them. There was no clandestine or secret activity or spying by Petitioner Weatherford; he was asked to be present by the attorney and the client, he was not being represented by the attorney, and he was a third party invited into the conversation.

The basic question thus becomes was there a valid confidential attorney-client relationship. Petitioners think that it is elementary that any privileged or confidential relationship was **waived** when Respondent Bursey and his

attorney purposely invited Petitioner Weatherford to be present at the two meetings. At this point there was no confidential attorney-client relationship to be violated.

It is apodictic that the presence of a third party not within the umbrella of the privilege destroys any privilege or right to confidentiality of the attorney-client relationship. See VIII Wigmore, *Evidence* § 2292 (McNaughton rev. 1961).

In *Hoffa v. United States,* 385 U. S. 293 (1966), this Court defined what circumstances would amount to an improper invasion of a defendant's sixth amendment right. In *Hoffa* this Court assumed that *Caldwell v. United States,* 205 F. (2d) 879 (D. C. Cir. 1953) and *Coplon v. United States,* 191 F. (2d) 749 (D. C. Cir. 1951) were rightly decided.

In *Caldwell* and *Coplon*[1] the boundaries set forth in *Hoffa* are delineated. In *Caldwell* the agent had a dual capacity as **defense assistant** and agent; he was within the umbrella of the attorney-client privilege. In *Coplon* the agents intercepted telephone calls between an attorney and his client; the attorney-client privilege had thus not been waived.

In *Hoffa,* like the instant case, the agent was invited into attorney-client conversations; in *Hoffa,* unlike the instant case, the agent was assumed to have reported some of the activities of defense counsel to the prosecutor. *Hoffa, supra,* at 307. In *Hoffa* the court says:

> "It is possible to imagine a case in which the prosecutor might so pervasively insinuate itself into councils of the defense . . ." *Hoffa, supra,* at 309.

This Court in *Hoffa* recognizes that the prosecution's agent must invade the privilege by either intercepting in-

[1] The Court of Appeals in its decision used as a basis for its finding *United States v. Rispo,* 460 F. (2d) 965 (3d Cir. 1972); this case would seem to be in conflict with *Hoffa, Caldwell* and *Coplon*.

formation without knowledge of the attorney and client or by coming within the umbrella of the privilege and subsequently giving information to the prosecution.

In the instant case the findings of the Court of Appeals in reversing the District Court are so in contravention of the principles of *Hoffa* that the court should issue its writ of certiorari.

In holding that the mere presence of an undercover agent during a defendant's conversations with his counsel is a *per se* violation of that defendant's sixth amendment right to effective assistance of counsel, the Court of Appeals has not only ignored *Hoffa*, but also incorrectly interpreted *Black v. United States*, 385 U. S. 26 (1966) and *O'Brien v. United States*, 386 U. S. 345 (1967), thereby severely handicapping state officials in their administration of effective law enforcement.

The *Black-O'Brien* rule is construed by the Court of Appeals to hold that whenever there is any kind of intrusion into the attorney-client relationship requiring reversal of a criminal conviction and a new trial, the sixth amendment right to effective assistance of counsel has been abridged. It is respectfully suggested that neither *Black* nor *O'Brien* establish such a *per se* rule.

Reversal and new trial in *Black* and *O'Brien* were ordered "so as to afford the petitioner an opportunity to protect himself from the use of evidence that might be otherwise inadmissible" and to "give the parties an opportunity to present the relevant evidence and permit the trial judge to decide the questions involved." *Black v. United States*, 385 U. S. 26, 87 S. Ct. 190, 17 L. Ed. (2d) 26, 29. Had the intrusion alone been sufficient to establish denial of effective assistance of counsel, outright reversal would have followed instead of a new trial. If it had already been established that the criminal defendant had

been denied the effective assistance of counsel, no further finding of a trial judge could correct the situation.

In both *Black* and *O'Brien* the dissenting opinion of Justices Harlan and Stewart quarrel with procedure only, arguing that the Supreme Court in reversing the convictions as an appropriate vehicle for sorting out the eavesdropping issue "puts the car before the horse." 19 L. Ed. (2d) at 96. The dissenting opinion in *Black* states:

> ". . . I would remand the case to the District Court for a full hearing as to the circumstances and effects of these activities." 18 L. Ed. (2d) at 97.

It is urged that the *Black* and *O'Brien* cases do not hold that the intrusion alone establishes denial of sixth amendment rights to effective assistance of counsel, but that they hold that the fact of intrusion requires full inquiry into the circumstances in order to determine whether or not such denial has taken place.

The Court of Appeals did not, as it should in both logic and law, consider the circumstances surrounding the alleged intrusion into the attorney-defendant relationship and the District Court's finding that the intrusion did not **in fact** interfere with Bursey's effective right to counsel. See Appendix B at 30 and 32; Findings of Fact 11 and 16.

The basic question presented by the facts of this case is whether an agent is under an affirmative duty to avoid all contacts with an accused and his attorney prior to trial. No judicial decisions support such a rule. *See* Appendix B at 35; Conclusions of Law H. Furthermore, no judicial decision has been found to support the Court of Appeals contention of a *per se* violation of sixth amendment rights.

II

In holding that Bursey's right to a fair trial was violated because Weatherford's identity was concealed until Weatherford testified against Bursey, the Court of Appeals has, without any judicial or legislative support, extended the rationale of *Brady v. Maryland*, 373 U. S. 83 (1963), to require a prosecutor to divulge the identity of an informer in the event he will become a witness. This action is not required under any opinion of this court.

The Court of Appeals in its order seems to hold that a prosecutor on his own initiative must reveal the names of all his potential witnesses to a defendant prior to trial, and in time to allow defendant adequate time to investigate such witnesses. For this wholly unsupported proposition the Court of Appeals cites *Brady v. Maryland*, 373 U. S. 83 (1963).

In *Brady* the Court said:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material. . . ." *Id.* at 87.

Nowhere in *Brady* does it say that the prosecutor is required to give the defendant his entire case to include the names of all potential witnesses. *Brady* is concerned only with the prosecution withholding exculpatory information, and then only when the defendant requests it. In this case it can hardly be said that informer Weatherford's identity and testimony were exculpatory; indeed, they were just the opposite. Moreover, Bursey's attorney did not make any requests for information.

The Court of Appeals order is without support in *Brady* or elsewhere when it states that the failure to reveal an informant's identity after an indictment denies the individual a fair trial. It is respectfully submitted that

the State has the right and indeed the duty to utilize undercover agents and that the indictment of one defendant does not require the State to reveal that agent's cover. The Court of Appeals has attempted to expand *Brady* far beyond its holding and indeed far beyond any subsequent holding concerning a prosecutor's duty to reveal his case, and by doing so has severely and without justification limited the use of undercover agents in law enforcement.

III

While it is recognized that the United States Supreme Court does not usually grant certiorari to review facts, this case presents matters of evidence in the decision of the Court of Appeals in direct conflict with the District Court which are shockingly wrong and thereby present a substantial due process question.

The District Court found that "there is no testimony connecting defendant Strom with any of such acts allegedly committed by Weatherford." Appendix B at 11, Conclusion of Law L. The Court of Appeals held that this finding of fact by the District Court was "clearly erroneous," and that "Strom's own decisions directly caused the violation of Bursey's constitutional rights." Appendix A at 11. The decisions of Strom to which the Court of Appeals refers are: (1) the decision to maintain Weatherford's cover; (2) the decision to allow Solicitor Foard to work out the details of maintaining Weatherford's cover; and (3) the decision to allow Weatherford to testify.

It is respectfully submitted that the District Court was correct in its finding that Strom had no connection with the actions of Weatherford. To prove that Strom participated in the deprivation of Bursey's constitutional rights, it is essential that Strom had knowledge of Weatherford's meetings with Bursey and Bursey's attorney.

The Court of Appeals, finding no direct knowledge on the part of Strom, relies on three of his "decisions" that are unrelated to the plaintiff's alleged constitutional deprivations. Strom's decisions to maintain Weatherford's cover and to entrust this matter to Solicitor Foard are not, by any stretch of the imagination, tantamount to requesting Weatherford to intrude upon the attorney-client relationship. Likewise, Strom's approval of the use of Weatherford as a witness concerned the dissolution of Weatherford's cover, and not the approval of Weatherford's intrusion, if any.

It is respectfully submitted that the Court of Appeals' finding of fact that Strom caused the violations of Bursey's constitutional rights is clearly erroneous and shocking, requiring review by this Court.

The Court of Appeals concluded that liability through the doctrine of *respondeat superior*[2] does not apply to this case because that doctrine only applies to an "innocent master being held vicariously liable for the acts of his servant." Absent a finding of fact that defendant Strom either directed or knew of agent Weatherford's activities with Bursey and Bursey's attorney, Strom is an innocent master; the District Court correctly so held.

[2] The Court of Appeals and the District Court both recognize that the doctrine of *respondeat superior* does not apply to 42 U. S. C. 1983 actions.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

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APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 74-2242

BRETT ALLEN BURSEY, APPELLANT,

versus

JACK M. WEATHERFORD, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN AGENT OF THE SOUTH CAROLINA STATE LAW ENFORCEMENT DIVISION; PETE STROM, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHIEF OF THE SOUTH CAROLINA STATE LAW ENFORCEMENT DIVISION AND OTHER UNKNOWN AGENTS AND OFFICIALS OF THE SOUTH CAROLINA STATE LAW ENFORCEMENT DIVISION, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT COLUMBIA. ROBERT F. CHAPMAN, DISTRICT JUDGE.

Argued October 10, 1975 Decided December 2, 1975

Before BOREMAN, Senior Circuit Judge, and CRAVEN and FIELD, Circuit Judges

LAUGHLIN McDONALD (NEIL BRADLEY, and HERBERT E. BUHL, III, on brief), for Appellant; JOSEPH C. COLEMAN, Deputy Attorney General of South Carolina, and (DANIEL R. McLEOD, Attorney General of South Carolina, on brief) for Appellees.

CRAVEN, Circuit Judge:

Appellant Brett Allen Bursey brought this suit under 42 U. S. C. § 1983 seeking damages for alleged violations under color of state law of his constitutional rights. He

named as defendants Jack Weatherford, an informant-agent of the South Carolina State Law Enforcement Division (SLED), J. P. Strom, Chief of SLED, and other unknown SLED agents, all in both their individual and representative capacities. Bursey claimed, *inter alia,* violation of his rights to a fair trial and to effective assistance of counsel secured to him under the fifth, sixth, and fourteenth amendments, as a result of intrusion by Weatherford into conferences between him and his attorney preceding his trial for malicious destruction of property.

The district court, hearing this case without a jury, entered judgment against Bursey. It held that Weatherford's conduct did not violate appellant's constitutional rights. We disagree, reverse, and remand for further proceedings.

I

On July 27, 1970, Bursey was tried and convicted of the crime of malicious destruction of property. This charge arose out of an incident during the early morning hours of March 20, 1970, during which a brick was thrown through the window of the Richland County Selective Service office in Columbia, South Carolina, and red paint was sprayed and splattered on the outside and inside of the building. Bursey was sentenced to 18 months in prison and served his time.[1]

Jack Weatherford, an informant employed by the South Carolina State Law Enforcement Division (SLED), participated in damaging the draft board property and then arranged his own and Bursey's arrest. To maintain his "cover," Weatherford was ostensibly indicted along with Bursey for the crime of malicious destruction of property, and arrangements were made by Solicitor Foard for his apparent retention of a well-known local attorney as his defense counsel. The purpose of it all was to convince Bursey and others that Weatherford was in bad trouble so that he could maintain his appearance as an apparent

[1] After his conviction, Bursey fled the state. In October, 1972, he was returned to South Carolina and served 18 months in prison.

Bursey did not appeal his conviction, nor did he seek post-conviction relief under either state law or federal habeas corpus.

codefendant while actually working for Strom and Foard. While there is no evidence of Strom's direct personal supervision of these machinations, it is clear from his testimony that he expected Weatherford to continue working as an undercover agent on the University of South Carolina campus and that he entrusted the details of the operation to Solicitor Foard.

During this period after the indictment of Bursey but before his trial, on at least two occasions Weatherford was present at meetings between Bursey and his attorney, C. Rauch Wise, at which the coming trial was discussed. Appellees urge that the intrusion was not deliberate but, instead, was simply additional necessary "cover." Since Bursey thought Weatherford was a friend and partner in crime, the latter could not avoid association without endangering revelation of his law enforcement role. For that reason only, appellees insist, Weatherford intruded upon the privacy of counseling. But SLED encountered bad luck,[2] and soon it became evident that Weatherford could no longer work effectively as an undercover agent. Upon the request of Solicitor Foard, Strom agreed to allow Weatherford to testify against Bursey, a turn of events which Strom testified he did not anticipate at the time of Bursey's arrest. Doubtless surprised and dismayed, Bursey was convicted on Weatherford's eyewitness testimony.

II

The district judge made the following findings of fact which are particularly relevant to the issues presented on appeal:

> [1.] On two occasions following the employment of plaintiff's attorney, said attorney, the plaintiff and the defendant Weatherford met and the approaching trial was discussed. On neither of these occasions did the defendant Weatherford seek information from the

[2] Weatherford and other SLED agents were seen and recognized by one of Bursey's friends while they were vacationing at Hilton Head Island, South Carolina, during the summer of 1970. According to Weatherford's testimony, Strom gave him permission to go on that trip (App. 171) in spite of the obvious danger of "blowing" his cover.

plaintiff or his attorney, and on neither occasion did he initiate or ask for the meeting. . . .

[2.] That following the various meetings with the plaintiff and/or plaintiff's attorney nor at any time did the defendant Weatherford discuss with or pass on to defendant Strom, any agents of SLED, or to Solicitor John Foard and/or any of his staff any details or information regarding the plaintiff's trial plans, strategy or anything having to do with the criminal action pending against plaintiff. . . .

[3.] From the beginning Weatherford advised plaintiff and plaintiff's attorney that Weatherford would obtain a severance of his case from that of the plaintiff. . . . On no occasion did Bursey or his attorney question the granting of a severance nor did they seem to concern themselves with whether the prosecutor would consent to a severance; although such consent is quite unusual where codefendants are charged with the same crime and proof will be from the same witnesses based upon identical facts. . . .

On these facts the district judge concluded that Bursey's constitutional rights had not been violated. He held in effect that: (1) there had been no "gross" intrusion upon the confidential relationship between Bursey and his lawyer because the participation in these conferences by Weatherford was not for the purpose of obtaining information concerning trial strategy, etc.; (2) Bursey had not been prejudiced as a result of Weatherford's presence during these conferences because their content had not been communicated to Solicitor Foard or Strom; and (3) Weatherford's actions, and especially his statements concerning severance of his trial, should "have put them [Bursey and his attorney] on notice that Weatherford might be an agent."

We disagree and conclude that on the facts as found by the district court Bursey's rights to effective assistance of counsel and a fair trial were violated.

III

Effective Assistance of Counsel

Ours is an adversary system of justice. Deliberately planting an informer in the council of trial preparation, or an electronic monitor, is, of course, a "gross" intrusion upon the confidentiality of the lawyer-client relationship protected by the sixth amendment. The Supreme Court has said so:

> Both of those cases[3] dealt with government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel.

Hoffa v. United States, 385 U. S. 293, 306 (1966) (footnote added). But we think it does not follow, as appellees urge, that the sixth amendment is violated only where there has been a "gross" intrusion into the attorney-client relationship. We agree with the Third Circuit that it is a waste of time to undertake to decide whether an intrusion may be characterized as "gross",[4] and that instead we should decide whether it is deliberate or inadvertent. Here it was not inadvertent but was knowingly permitted by the prosecution. That the intrusion was not for the purpose of obtaining information but was to maintain Weatherford's cover is, we think, of no consequence. We conclude that whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial.

We think *Black v. United States,* 385 U. S. 26 (1966), and *O'Brien v. United States,* 386 U. S. 345 (1967), read together, establish such a *per se* rule. In *O'Brien,* a defendant's conversation concerning his forthcoming trial was monitored, but the conversation was not mentioned in any FBI report, nor were its contents communicated to attorneys for the Department of Justice, including those whose prosecuted the case. Nevertheless, the Supreme

[3] *Caldwell v. United States,* 205 F. (2d) 879 (D. C. Cir. 1953), *cert. denied,* 349 U. S. 930 (1955), and *Copland v. United States,* 191 F. (2d) 749 (D. C. Cir. 1951), *cert. denied,* 342 U. S. 926 (1952).

[4] *United States v. Rispo,* 460 F. (2d) (3d Cir. 1972).

Court summarily vacated the judgment below and remanded for a new trial.[5]

We put aside cases such as *United States v. Rosner*, 485 F. (2d) 1213 (2d Cir. 1973), *cert. denied*, 417 U. S. 950 (1974), and *United States v. Mosca*, 475 F. (2d) 1052 (2d Cir.), *cert. denied*, 412 U. S. 948 (1973), as clearly inapplicable. As the court in *Rosner* said, the fact situation there was wholly different from our situation—that of the "dummy defendant, the ultimate in the chicanery of unlawful intrusion. . . ." *Rosner, supra* at 1227.

In the context of a civil suit, our holding that Bursey's sixth amendment right to counsel was violated sustains his suit irrespective of any showing of substantial prejudice to his defense. *Via v. Cliff*, 470 F. (2d) 271, 275 (3d Cir. 1972). However, prejudice may be very relevant to the issue of damages,[6] and we note the record establishes that Weatherford, fully acquainted with Bursey's trial strategy, talked with Solicitor Foard, who prosecuted the case, before trial and, of course, testified against Bursey. On these facts we find him to have been a member of the prosecution and further note that in an adversary system learning the plans of one's opponent, as Weatherford did, is generally thought to be worthwhile. Indeed, espionage rests upon such a premise.

Fair Trial

We also hold that Bursey's rights to a fair trial were violated by the government's countenancing of Weatherford's role in this case. *Brady v. Maryland*, 373 U. S. 83 (1963). In *Brady* the Court held that the prosecution had a duty under the due process clause to insure that "criminal trials are fair" by disclosing evidence favorable to the defendant upon request. Here appellees insist that state officers may conceal the identity of an informant from a defendant during his trial preparation, that the informant

[5] We need not presently decide the correct rule in a case of inadvertent intrusion, but we are inclined to agree with the Third Circuit that in such a case there would be constitutional error requiring a new trial unless it is found to be harmless beyond a reasonable doubt within the meaning of *Chapman v. California*, 386 U. S. 18 (1967). *United States v. Rispo*, 460 F. (2d) 965, 977 (3d Cir. 1972).

[6] *Via, supra* at 275 n. 3.

can deny up through the day before his appearance at trial that he will testify against the defendant, and that he can then testify with devastating effect—all without impairing a fair trial. We think not. Deception is an appropriate instrument in crime solution. It is inappropriate and highly suspect when utilized **after** indictment with the effect of lulling a defendant into a false sense of security and thus denying him the opportunity (1) to consider whether plea bargaining might be the best course, (2) to do a background check on Weatherford for purposes of cross examination, and (3) to attempt to counter the devastating impact of eyewitness identification.

We wholly disagree with the court below that Weatherford's conduct and his indication that he would seek a severance of his own trial should have put Bursey and his lawyer on notice "that Weatherford might be an agent." We think otherwise, but if we did not, we would nevertheless hold that whether Bursey and his lawyer should have been able to discern the deception is irrelevant. It is not a defense for appellees to show that in spite of the prosecutor's best efforts to conceal the truth a more astute victim might not have been deceived. Such an approach is a caricature of the *Brady* principle.

IV

The district court found that "there is no testimony connecting defendant Strom with any . . . acts allegedly committed by Weatherford . . . [and] [s]ince the Doctrine of *Respondeat Superior* does not apply in 1983 cases, there could be no finding against defendant Strom." The court's factual finding is clearly erroneous and its legal analysis is incorrect.

The testimony of Strom at trial shows that (1) he participated in the decision to maintain Weatherford's cover; (2) he entrusted the details of perfecting the cover to Solicitor Foard, who was at his office the day of the arrest; and (3) that he concurred personally in the decision to allow Weatherford to testify. App. 109-11. Furthermore, according to appellees' own argument on appeal, contact of the type which occurred in this case and violated

Bursey's constitutional rights was absolutely essential to the continued viability of Weatherford as an undercover agent in view of his "close relationship" with Bursey. Brief for Appellees at 4. This is therefore not at all a case involving liability through the principle of *respondeat superior*. That concept applies only to an innocent master being held vicariously liable for the acts of his servant. Here Strom's own decisions directly caused the violation of Bursey's constitutional rights, and that is a separate basis for liability. 2 F. Harper & F. James, The Law of Torts 1362, 1366 (1956); W. Prosser, Law of Torts 460 (4th ed. 1971). We here simply read 42 U. S. C. § 1983 "against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U. S. 167, 187 (1961).[7]

V

On appeal Weatherford and Strom argue that in any case they cannot be found personally liable absent "a showing of bad faith, malice or recklessness."[8] We disagree.

In *Wood v. Strickland*, 420 U. S. 308 (1975), the Supreme Court set down the following statement of the "qualified good faith" test in the specific context of school discipline:

> [W]e hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected. . . .

Id. at 322. Although this test was stated specifically in the context of school discipline, we think it applicable to the conduct of appellees. Qualified immunity, of course, depends upon weighing the "scope of discretion and the responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action. . . ." *Scheuer v. Rhodes*, 416 U. S. 232, 247 (1974). *See also O'Connor v. Donaldson*, 43 U. S. L. W. 4929, 4934 (U. S. June 26, 1975); *Knell v. Bensinger*, 44 U. S. L. W. 2184 (7th Cir. Sept. 26, 1975).

Because he proceeded to decide the case on other grounds, the district judge had no occasion to rule on *Strickland*-type good faith defense, and indeed, it does not appear that the defense was tendered below. It is, however, argued on appeal, and we think the appellees are entitled to assert it in further proceedings on remand.[9]

REVERSED AND REMANDED.

---

[7] In *Barrow v. Bounds*, No. 74-1731 (4th Cir. July 1, 1974), we stated:

> We agree with the majority of federal courts which have considered the question that where, as here, money damages are sought pursuant to 42 U. S. C. § 1983, some personal involvement by the defendant is required; the doctrine of *respondeat superior* does not apply.

Id. at 2-3.

We believe that the requirement of "personal involvement" is satisfied in this case by the actions and decisions of Strom. *See Curtis v. Everette*, 489 F. (2d) 516, 521 (3d Cir. 1973), *cert. denied*, 416 U. S. 995 (1974); *Wright v. McMann*, 460 F. (2d) 126, 134-35 (2d Cir.), *cert. denied*, 409 U. S. 885 (1972).

[8] We note that if the suit against Weatherford and Strom in their representative capacities is not barred by the eleventh amendment, the defense that they acted in good faith is inapplicable. *Thomas v. Ward*, No. 74-1541 (4th Cir. Nov. 24, 1975).

[9] While we do not undertake to decide this question on the record before us, we note that the testimony given by Strom below may be read to mean that he "reasonably should have known that the action he took within his sphere of official responsibility would violate [Bursey's] constitutional rights. . . ." *Wood, supra* at 322. He testified that he knew that sending an agent into a conference between a criminal defendant and his attorney would violate the defendant's sixth amendment rights. App. 116. He also testified that if he had known the day after Bursey's arrest that Weatherford was going to testify against him, he would have called him off the case and "wouldn't have had him to meet with them" (App. 114), but he then assented to Solicitor Foard's request that Weatherford testify against Bursey.

Civil Action No. 73-665

BRETT ALLEN BURSEY, PLAINTIFF,

versus

JACK M. WEATHERFORD, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN AGENT OF THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION; PETE STROM, INDIVIDUALLY AS CHIEF OF THE SOUTH CAROLINA STATE LAW ENFORCEMENT DIVISION; AND OTHER UNKNOWN AGENTS AND OFFICIALS OF THE SOUTH CAROLINA STATE LAW ENFORCEMENT DIVISION, DEFENDANTS.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This case was tried before the Court without a jury in Columbia, South Carolina on June 10 and 11, 1974. It is brought under 42 U. S. C. 1983 seeking monetary damages to redress the alleged deprivation, under color of state law, custom or usage of the plaintiff's rights, privileges and immunities secured by the Constitutions of the United States and the State of South Carolina.

The plaintiff contends that his right to a fair trial before the Court of General Sessions for Richland County, South Carolina on July 27, 1970, was prejudiced and his constitutional rights violated by the actions of the defendants. On July 27, 1970, the plaintiff was tried and convicted by a jury of the crime of malicious destruction of property occupied by the Richland County Selective Service Board, and alleges that prior to the trial the defendants Strom

and/or unknown agents and officials did instruct the defendant Weatherford, in the latter's official capacity as an undercover agent for the State Law Enforcement Division (SLED), to continue to pose as a criminal defendant under indictment for charges arising out of the same incident from which plaintiff's conviction arose and that the defendants instructed Weatherford to seek by the employment of false pretenses admission to the attorney-client communications between the plaintiff and his retained counsel, and following said instructions the defendant Weatherford became privy to such communications and trial strategy to be employed in the plaintiff's defense and that said Weatherford reported back to defendant Strom and/or his agents and to the prosecuting attorney for the State information pertaining to the plaintiff's defense.

The plaintiff contends that such alleged actions constitute an illegal search and seizure, in violation of his rights under the Fourth and Fourteenth Amendments, a violation of his right to effective counsel under the Sixth and Fourteenth Amendments and a violation of his right to a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and under similar Articles and Sections of the Constitution of the State of South Carolina. The plaintiff prays for actual and punitive damages, court costs and attorneys fees.

The defendants deny that any of them sought information from the plaintiff or his attorney regarding his strategy or plans in defending himself against the criminal charge and further deny that if any information was obtained by defendant Weatherford it was by accident and not by design and such was not communicated to the defendant Strom or to the prosecuting attorney handling the criminal action brought against the plaintiff.

After hearing the testimony, reviewing the exhibits, reading the depositions introduced and studying the applicable law, the Court makes the following.

FINDINGS OF FACT

1. The plaintiff is a male citizen of the United States and a resident of Richland County, South Carolina.

2. The defendant Jack M. Weatherford is a male over the age of 21 years, a citizen of the United States and now a resident of LaJolla, California, but at the times hereinafter mentioned was a resident of Richland County, South Carolina and employed by the South Carolina State Law Enforcement Division as an undercover agent investigating primarily drug and anti-war activities throughout the State of South Carolina.

3. That the defendant Pete Strom is a male citizen of the United States, over the age of 21 years, and a resident of Richland County, South Carolina. At all times material to this action defendant Strom was Chief of SLED and one of his official duties was to supervise its agents and officers, including undercover agents such as defendant Weatherford, in the performance of their duties.

4. That some months prior to March, 1970, defendant Weatherford was employed by SLED as an undercover agent. At that time he was attending the University of South Carolina and became acquainted with the plaintiff through an organization known as "AWARE", which was a group on the University Campus formed to discuss the need for social change and opposition to the war in Viet Nam.

On the night of March 19, 1970, as a part of demonstrations connected with "National Anti-Draft Week" the plaintiff, the defendant Weatherford and one or two others went to the office of the Richland County Selective Service in Columbia, South Carolina, where a brick was thrown through a window, red paint as sprayed and splattered on the inside and outside of the building. Attached to the brick was a note attacking the Selective Service System and the war in Viet Nam.

5. On the morning of March 20, 1970, the plaintiff and defendant Weatherford were arrested after Weatherford had advised SLED agents of the participation by the plaintiff and Weatherford in the activities at the Selective Service Board Headquarters. Following the arrest the plaintiff and the defendant were taken to the Richland County Jail, where they were booked, charged with the offense and placed in separate cells. At the time of their arrest they were handcuffed together and plaintiff suggested that they keep silent and seek legal counsel.

6. The plaintiff was in jail approximately 12 days because of difficulties in arranging bond. Defendant Weatherford was released after a day, his bond having been posted for him by a Dr. Hardwicke.

7. Following plaintiff's release from jail he met with defendant Weatherford and asked him how he got out of jail, who posted his bond and whether he was represented by an attorney. Plaintiff was advised by said defendant that his bond had been posted by Dr. Hardwicke and arrangements had been made by Hardwicke for him to be represented by Attorney Frank Taylor, Sr., a well known member of the Richland County Bar.

8. That shortly after this meeting the plaintiff employed C. Rauch Wise of Greenwood to represent him in connection with the criminal charges. Following his release from prison defendant Weatherford continued to act as an undercover agent in the employment of SLED and was engaged in investigating activities and seeking information regarding law violations not only in Columbia but in other South Carolina cities. During this time he remained on the payroll of SLED and made most of his reports to Lt. Ronald Cooper, and rarely had any contacts or dealings directly with defendant Strom.

9. On two occasions following the employment of plaintiff's attorney, said attorney, the plaintiff and the defendant Weatherford met and the approaching trial was discussed. On neither of these occasions did the defendant Weatherford seek information from the plaintiff or his attorney, and on neither occasion did he initiate or ask for the meeting. He was brought into the meetings by the plaintiff and plaintiff's attorney in an effort to obtain information, ideas or suggestions as to the plaintiff's defense. From the beginning Weatherford advised plaintiff and plaintiff's attorney that Weatherford would obtain a severance of his

case from that of the plaintiff. This severance was to be upon the ground that Weatherford might be prejudiced in going to trial with Bursey as a codefendant, because of Bursey's reputation and participation in other activities which had been covered by the news media. On no occasion did Bursey or his attorney question the granting of a severance nor did they seem to concern themselves with whether the prosecutor would consent to a severance; although such consent is quite unusual where codefendants are charged with the same crime and proof will be from the same witnesses based upon identical facts. At these meetings between plaintiff, plaintiff's attorney and defendant Weatherford the plaintiff and his attorney raised the question of a possible informer being used to prove the case, but they never asked Weatherford if he were an informer and he never specifically denied being an informer, since he was never asked or accused.

10. The defendant Weatherford did not reveal himself as an informer at the two meetings with the plaintiff and the plaintiff's attorney. He also met the plaintiff's attorney on several occasions at the social events, usually connected with the Chapter of the American Civil Liberties Union in Columbia, South Carolina. On these social contacts he was not asked if he was an agent. In most meetings with the plaintiff's attorney the defendant Weatherford was questioned about how his attorney, Frank Taylor, Sr., was handling his defense. This was a natural reaction of a younger attorney trying to learn from an older more experienced attorney.

11. That following the various meetings with the plaintiff and/or plaintiff's attorney nor at any other time did the defendant Weatherford discuss with or pass on to defendant Strom, any agents of SLED, or to Solicitor John Foard and/or any of his staff any details or information regarding the plaintiff's trial plans, strategy or anything having to do with the criminal action pending against plaintiff. Until the morning of the 27th of July, 1970, Weatherford did not know he would be used as a witness in the criminal action and Solicitor Foard had not decided, until just prior to the call of the case, that he would use

Weatherford as a witness. Up until that time he intended to use as the primary witness for identification of Bursey and his participation in the crime one William Burt Finney, III, a student at Clemson University, who knew Bursey, had met him on the night of March 19, 1970, and had written out for Bursey the note which was attached to the brick found inside the Selective Service Office.

12. The attorneys Wise and Taylor met on one occasion prior to the trial of Bursey, but nothing was said which could have misled plaintiff's attorney in handling his defense and no information was passed to Attorney Taylor by Wise regarding defense plans and strategy. Mr. Taylor did not discuss with any representative of SLED or the prosecutor or any representative of the prosecutor the meetings with plaintiff's counsel or any information obtained from said meetings.

13. Up until the date of the trial the prosecutor and SLED preferred to try the case without the testimony of Weatherford rather than run the risk of revealing him as an undercover agent, due to other matters Weatherford was investigating in and around the University of South Carolina and at other points in the State. However, on the date of the trial the prosecutor and representatives of SLED decided that Weatherford had lost some of his effectiveness as an undercover agent in recent weeks due to being seen in the company of police officers on several occasions.

14. At the trial of the case of the *State of South Carolina v. Brett Allen Bursey,* defendant Weatherford was the first witness called by the State and testified as to his activities as an undercover agent and the events of the night of March 19, 1970. Other witnesses, including William Burt Finney, III also testified for the State. As a result of Weatherford's testimony Bursey took the stand in his own defense and attempted to justify his action and show that the same was not maliciously done.

15. Following conviction the plaintiff was again jailed, this time for six days, until he was released on bond pending appeal. Following his release, plaintiff discussed the

appeal with his attorney, who would require an additional fee to perfect and argue the appeal, but questioned the possibility of success. Thereafter the plaintiff fled the State of South Carolina. He was a fugitive until he was picked up in Nebraska and returned to South Carolina in October, 1972, and served approximately eighteen (18) months on the sentence resulting from his conviction in the trial of July 27, 1970.

16. The defendant Weatherford did not in any way interfere with the plaintiff's right to assistance of counsel or right to a fair trial nor did he obtain any information from plaintiff or his attorney amounting to an illegal search and seizure. No information following the arrest of plaintiff or following his employment of counsel was relayed by Weatherford to any agent of SLED or person connected with the prosecution of the case.

CONCLUSIONS OF LAW

A. This Court has jurisdiction of this matter under 42 U. S. C. 1983 and 28 U. S. C. 1343.

B. The right of a criminal defendant to have the assistance of counsel in the trial of a criminal case is protected by the Sixth Amendment to the Constitution of the United States and has been expanded by cases from *Gideon v. Wainwright,* 372 U. S. 335 (1963) through *Argersinger v. Hamlin,* 407 U. S. 25 (1972). The right of privacy surrounding the attorney-client relationship is also protected by decisions, rules of court and canons of professional responsibility.

C. The plaintiff leans heavily upon the decisions in *Coplon v. United States,* 191 F. (2d) 749 (D. C. Cir. 1951) and *Caldwell v. United States,* 205 F. (2d) 879 (D. C. Cir. 1953). The Supreme Court in *Hoffa v. United States,* 385 U. S. 293 (1966) supported the reasoning behind the *Coplon* and *Caldwell* decisions regarding Sixth Amendment violations where agents of the prosecution reported conversations and activities of a defendant and defense counsel to the prosecution. However, the present case is a far cry from *Coplon* and *Caldwell.* In *Coplon* the FBI intercepted telephone conversations between the defendant and

defense counsel through electronic surveillance, without the knowledge of the defendant or her attorney. This surveillance occurred before the trial and during the process of the trial and the Court found it to be a violation of the due process clause of the Fifth Amendment and of the right of effective assistance of counsel protected by the Sixth Amendment. In *Caldwell* the interference with counsel was occasioned by the work of an agent paid by the prosecution. He worked his way into the confidence of the defendant and defense counsel and was actually hired by them to do certain investigative work in preparing the defense of the case. He reported to the prosecution on many matters connected with the impending trial and was privy to any conference he wished to attend involving the defense counsel, defendant or witnesses for the defendant. In the present case there is no proof that Weatherford reported anything to the prosecutor or defendant Strom from the two meetings he had with the plaintiff and plaintiff's attorney Wise. The testimony on this point is unequivocal that the prosecutor and defendant Strom or any agent of either did not receive from Weatherford any information from the conferences or any information as to the defense plans. The record is clear that Solicitor John Foard did not discuss the case with Weatherford until the morning of the Bursey trial and even then received no information as to the conferences attended by Weatherford with Bursey and his attorney.

D. It is also important in the present case that Weatherford did not seek out Bursey or his attorney in an effort to obtain information from them. He did not ask to attend the conferences, did not volunteer information to the plaintiff or his attorney and it appears from the testimony that plaintiff and his attorney were more interested in finding out from the conferences what Weatherford's attorney was planning by way of defense, since Weatherford was represented by a well-known, able and experienced attorney. Nothing was done by Weatherford, the defendant Strom, any of the SLED agents, the prosecutor or Weatherford's attorney to attempt to obtain information about Bursey, his attorney or his defense plan. The

prosecutor felt he had sufficient witnesses to prove the case against Bursey and was not concerned about his defense strategy.

E. The plaintiff and his attorney both testified that they felt there must be an informer in the picture and spent a great deal of time trying to decide who the informer might be. Certainly, they should have become suspicious when the State proceeded against Bursey and not against Weatherford, and no motion for severance was made. Weatherford had originally advised Bursey and later his attorney that Weatherford would obtain a severance, which he did, but no motion was made for severance and no resistance appeared from the prosecutor. Also, Weatherford's attorney showed little or no interest in the case in his brief discussion with plaintiff's attorney. The severance was not mentioned in this conversation and Weatherford's attorney never asked permission to discuss the case with Bursey or showed any interest in the facts. These activities did not mislead the plaintiff and his attorney. Such facts would have put them on notice that Weatherford might be an agent.

F. The plaintiff contends in effect that the law requires an undercover agent to reveal himself and stop his activities once an arrest has been made. This is not supported by the decisions. There is no requirement that an undercover agent reveal himself to the person arrested at the time of such arrest or at any time prior to the trial. The *Coplon* and *Caldwell* decisions prevent such an agent from taking advantage of his position as a confidant of the defendant in order to obtain privileged information from a defendant or his attorney to be used in his prosecution. In the present case separate counsel was obtained for Weatherford so that he could keep his cover and could avoid having to explain why he did not wish to be represented by Bursey's attorney. This action was designed to protect Weatherford, and to insure Bursey's constitutional right to due process and effective assistance of counsel.

G. The use of informers to obtain information for law enforcement officers has existed and had the approval of

courts for years. In *United States v. Dennis,* 183 F. (2d) 201 (1950) Judge Learned Hand stated:

> "Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, and in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly. . . ."

In the present case both the State and Weatherford had a legitimate interest in maintaining his cover for as long as possible. He was working on numerous matters of importance to the law enforcement division and such an agent must always be concerned for his personal safety, once he has been identified.

H. The basic question presented by the present facts is whether an agent is under an affirmative duty to avoid all contacts with an accused and his attorney prior to trial. No decisions have been cited to sustain such a rule and none have been found by the Court. *Coplon* and *Caldwell* do not stretch far enough to cover the present facts. As stated at page 306 of *Hoffa v. United States,* 385 U. S. 293 (1966):

> "Both of those cases (*Caldwell* and *Coplon*) dealt with government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel."

Hoffa also explains the protection of the Fourth Amendment from unreasonable searches and seizures, which does not apply to the present facts.

I. It is strange that the plaintiff now contends that he was denied his constitutional rights to a fair trial by actions of agents of the State of South Carolina, but following the conviction in July, 1970, he did not have sufficient confidence in these constitutional positions to perfect his appeal to the Supreme Court of South Carolina. Instead he fled the state and was a fugitive for approximately ten months. When he returned and was incarcerated, he still had available to him the Uniform Post-Con-

viction Procedure Act (Title 17-601 *et seq.*, Code of Laws of South Carolina, 1962, as amended). He did not attack his conviction or sentence under this Act as being violative of his constitutional rights.

J. The plaintiff alleges that he was denied the right to plea bargain because of Weatherford's action and the surprise of his appearance as a witness. The record does not support this allegation, since there is nothing in the record to show that any plea bargaining was ever attempted by plaintiff or his attorney, or that it was impossible to bargain after the testimony of Weatherford.

K. Plaintiff also alleges mental pain and suffering caused by the circumstances in which Weatherford's identity was revealed. It must be remembered that this is an action brought for the alleged deprivation of constitutional rights. In order to recover damages there must be a proof of such deprivation, which has not been accomplished in this case. If the Court were to award such mental pain and suffering because of the appearance of an informer on the witness stand, we would have even more 1983 actions clogging the docket of this court.

L. Even if there were proof that Weatherford violated some constitutional right of Bursey, which there is not, there is no testimony connecting defendant Strom with any of such acts allegedly committed by Weatherford. Since the Doctrine of *Respondeat Superior* does not apply in 1983 cases, there could be no finding against defendant Strom. See *Barrow v. Bounds,* Opinion 74-1731, 4th Cir. Ct. of Appeals dec. July 1, 1974.

IT IS, THEREFORE, ORDERED that judgment be entered for the defendants in this action.

AND IT IS SO ORDERED.

/s/ ROBERT F. CHAPMAN,
United States District Judge.

August 20th, 1974
Florence, South Carolina

appendix

Supreme Court, U. S.
FILED
AUG 4 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1510

JACK M. WEATHERFORD, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN AGENT OF THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION, PETE STROM, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHIEF OF THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION; AND OTHER UNKNOWN AGENTS AND OFFICIALS OF THE SOUTH CAROLINA STATE LAW ENFORCEMENT DIVISION, PETITIONERS,

versus

BRETT ALLEN BURSEY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Certiorari Filed April 19, 1976
Certiorari Granted June 21, 1976

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

		Original	Print
1.	Docket Entries in the Proceedings Below ..		2
2.	Complaint in the United States District Court for the District of South Carolina		3
3.	Answer in the United States District Court for the District of South Carolina		7
4.	Motion for Summary Judgment in the United States District Court for the District of South Carolina		9
	(a) Affidavit of John W. Foard attached to Motion for Summary Judgment .		10
	(b) Affidavit of J. P. Strom attached to Motion for Summary Judgment		10
	(c) Affidavit of Jack M. Weatherford, attached to Motion for Summary Judgment		11
	(d) Transcript of Record, State of S. C. v. Brett A. Bursey, in the Richland County Court of General Sessions, attached to Motion for Summary Judgment (omitted)		12
5.	Order in the United States District Court for District of South Carolina		12
6.	Transcript of Record, Brett A. Bursey, Plaintiff, v. Jack M. Weatherford, et al., Defendants, in the United States District Court for the District of South Carolina		20
	(a) Direct Examination of Brett A. Bursey	2	21
	(b) Cross Examination of Brett A. Bursey	56	56
	(c) Direct Examination of Clarence R. Wise	88	77

	Original	Print
(d) Cross Examination of Clarence R. Wise	111	92
(e) Redirect Examination of Clarence R. Wise	121	98
(f) Direct Examination of J. P. Strom	124	100
(g) Cross Examination of J. P. Strom	133	106
(h) Redirect Examination of J. P. Strom	166	127
(i) Direct Examination of John W. Foard, Jr.	167	128
(j) Cross Examination of John W. Foard, Jr.	172	131
(k) Direct Examination of Frank L. Taylor	178	135
(l) Cross Examination of Frank L. Taylor	184	138
(m) Direct Examination of James A. Spruill, III	187	140
(n) Cross Examination of James A. Spruill, III	189	142
(o) Redirect Examination of James A. Spruill, III	191	143
(p) Direct Examination of Lt. Ronald W. Cook	191	143
(q) Cross Examination of Lt. Ronald W. Cook	194	145
(r) Exhibits Received into Evidence	205	153
(s) Direct Examination of Jack M. Weatherford	206	153
(t) Cross Examination of Jack M. Weatherford	215	159

	Original	Print
(u) Examination of Jack M. Weatherford by the Court	270	194
(v) Cross Examination of Jack Weatherford	274	197
(w) Affidavit of C. Rauch Wise in the United States District Court (Plaintiff's Exhibit 1)		198
(x) Transcript of Testimony of the Preliminary Hearing in the Magistrates Court, Richland County (Plaintiffs' Exhibit 2)	1	201
(y) Designated Portions of Deposition of J. P. Strom in the United States District Court for the District of South Carolina (Plaintiffs' Exhibit 3)	9	210
	37	219
(z) Designated Portion of the Transcript of Record in the Richland County Court of General Sessions (Plaintiffs' Exhibit 4)		225
(1) Direct Examination of Jack Weatherford	35	225
(2) Cross Examination of Jack Weatherford	49	234
(3) Redirect Examination of Jack Weatherford	56	239
(4) Recross Examination of Jack Weatherford	57	240
(aa) Designated Portion of Deposition of Jack Weatherford in the United States District Court for the District of South Carolina (Plaintiffs' Exhibit 5)	87	240

	ORIGINAL	PRINT
7. Findings of Fact and Conclusions of Law in the United States District Court for the District of South Carolina	1	245
8. Opinion in the United States Court of Appeals for the Fourth Circuit	1	256
9. Appellee's Petition for Rehearing and Motion for Rehearing en banc in the United States Court of Appeals for the Fourth Circuit	1	265

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1510

JACK M. WEATHERFORD, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN AGENT OF THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION, PETE STROM, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHIEF OF THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION; AND OTHER UNKNOWN AGENTS AND OFFICIALS OF THE SOUTH CAROLINA STATE LAW ENFORCEMENT DIVISION, PETITIONERS,

versus

BRETT ALLEN BURSEY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

C/A 73-665

Date	*Proceedings*
7- 2-73	Complaint & Summons to USM
7- 9-73	Answer of Defendants
9- 7-73	Motion & Notice of the Defendants for Summary Judgment, Affidavits of John W. Foard, J. P. Strom, and Jack M. Weatherford
9- 7-73	Transcript of Testimony and Proceedings in the Court of General Sessions, County of Richland, S. C.

Date	*Proceedings*
10- 8-73	Affidavit of Brett Allen Bursey
10- 8-73	Affidavit of C. Rauch Wise
10- 9-73	Hearing (RFC) of Defendant's Motion for Summary Judgment
11- 1-73	Order (RFC) That the Defendants' Motion for Summary Judgment is denied. CC's Counsel
5-29-74	Calendar Call (RFC) Case Ready for Trial
6-10-74	Non-Jury Trial (RFC) 2 witnesses sworn for plaintiff. 5 for Deft.
6-11-74	Non-Jury (RFC) P-1-5 in evidence. No exhibits for deft., Plaintiff's supplemental brief due 6-24-74, Deft's in 10 days—7/5/74. Under advisement.
7- 1-74	Deposition of Jack McIver Weatherford, taken in Los Angeles, Calif. on 3/21/74 w/letter from Court Reporter listing corrections
8-21-74	Findings of Fact, Conclusions of Law & Order (RFC) that Judgment be entered for the Defendants, CC's to counsel
8-21-74	Judgment Entered for the Defendants. CC's to counsel
9- 9-74	Motion for leave to proceed on appeal *in forma pauperis,* on behalf of plaintiff
9- 9-74	Affidavit of Brett Allen Bursey in Support of Motion to Proceed on Appeal *in forma pauperis* with certificate of service
10-10-74	Order (RFC) allowing Plaintiff to proceed on appeal without prepayment of costs or fees or the necessity of giving security. CC's to counsel
10-10-74	Notice of Appeal on behalf of Plaintiff. CC's to counsel

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-2242

Date	*Proceedings*
12- 2-75	Judgment of Court of Appeals for the Fourth Circuit refersing Distruct Court
1-19-76	Defendants-Petitioners' Motion for Rehearing *En Banc* denied

SUPREME COURT OF THE UNITED STATES

No. 75-1510

Date	*Proceedings*
4-19-76	Petition for a Writ of Certiorari filed in United States Supreme Court
6-21-76	Petition for Writ of Certiorari Granted

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Brett Allen Bursey, Plaintiff,

-vs.-

Jack M. Weatherford, individually and in his official capacity as an agent of the South Carolina State Law Enforcement Division; Pete Strom, individually and in his official capacity as Chief of the South Carolina State Law Enforcement Division; and other unknown agents and officials of the South Carolina State Law Enforcement Division, Defendants.

COMPLAINT

Civil Action No. 73-665

This action arises under the Fourth, Fifth, Sixth, and due process clause of the Fourteenth Amendments to the United States Constitution; the privileges and immunities clause of the United States Constitution, Article IV, Section 2; and the Constitution of South Carolina, Article I,

Sections 5, 16, and 18 (1895). The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Section 1343; Code of Laws of South Carolina, Title 10.2, Section 801-804 (1966), as amended 1972; and the pendant jurisdiction of this Court over plaintiff's claims brought pursuant to the Constitution of South Carolina. This action is a suit authorized by Title 42 U.S.C. Section 1983 and the laws of South Carolina for monetary damages to redress the deprivation, under color of State law, custom, or usage of rights, privileges, and immunities secured plaintiff by the above mentioned sections of the Constitution of the United States and the Constitution of South Carolina.

2. Plaintiff is male, over the age of twenty-one years, a citizen of the United States, and a resident of Richland County, South Carolina.

3. Defendant Weatherford is male, over the age of twenty-one years, a citizen of the United States, and a resident of LaJolla, California. At all times material to this action, defendant Weatherford was acting under color and pretense of State law, custom, and usage in his official capacity as an undercover agent for the South Carolina State Law Enforcement Division. Defendant Strom is male, over the age of twenty-one years, a citizen of the United States, and a resident of Richland County, South Carolina. At all times material to this action, defendant Strom was acting under color and pretense of State law, custom, and usage in his official capacity as Chief of the South Carolina State Law Enforcement Division. One of defendant Strom's official duties was to supervise State Law Enforcement Division agents and officers, including defendants Weatherford and unknown agents and officials, in the performance of their police duties. Defendants unknown agents are male and/or female, over the age of twenty-one years, citizens of the United States, and residents of Richland County, South Carolina, whose identities are unknown to plaintiff. At all times material to this action, defendants unknown agents and officials were acting under color and pretense of State law, custom, and usage in their official capacity as agents and officials for the South Carolina State Law Enforcement Division. One of the official duties of these defendants was to supervise and/or work in coordination with defendant Weatherford in the performance of his undercover police activities.

4. **Factual Background.** On July 27, 1970, plaintiff was tried and convicted by a jury of the General Sessions Court of Richland County, South Carolina for the crime of malicious destruction to realty occupied by the Richland County Selective Service Board. Plaintiff alleges upon information and belief that prior to the above mentioned trial, defendants Strom and/or unknown agents and officials did instruct defendant Weatherford, in the latter's official capacity, to continue to pose as a criminal defendant under indictment for charges arising out of the same incident from which plaintiff's conviction did arise. Defendant Strom and/or defendants unknown agents and officials, in callous, disregard to plaintiff right to assistance of counsel, to privacy, and to a fair trial did then instruct defendant Weatherford to seek by the employment of said false pretense, admission to the attorney-client communications between plaintiff and his retained counsel, C. Rauch Wise. Defendant Weatherford did follow said instructions and was successful in becoming privy on numerous occasions prior to plaintiff's trial to these attorney client communications. At these communications contemplated defense strategies, pertaining both to factual and legal theories of defense, which were essential to plaintiff's criminal defense, were discussed in full. By his presence at these attorney-client communications, defendant Weatherford did obtain knowledge pertaining to said defense strategies. Moreover, defendant Weatherford did then report back to defendant Strom and/or defendants unknown agents and officials, who in turn communicated information pertaining to plaitiff's defense strategies to Solicitor John W. Foard, the State's prosecuting attorney in plaintiff's trial of June 27, 1970.

5. **Causes of Action.** The above alleged acts on the part of defendants constituted:

A. an illegal search and seizure in violation of rights secured to plaintiff by the Fourth and Fourteenth Amendments;

B. a violation of plaintiff's right to effective assistance of counsel secured to him by the Sixth and Fourteenth Amendments;

C. a violation of plaintiff right to a fair trial secured to him by the Fifth, Sixth and Fourteenth Amendments; and

plaintiff brings these actions pursuant to 42 U.S.C. Section 1983.

6. The above alleged acts on the part of defendant constituted:

A. an illegal search and seizure in violation of rights secured to plaintiff by the Constitution of South Carolina, Article I, Section 16;

B. a violation of plaintiff's right to effective assistance of counsel secured to him by the Constitution of South Carolina, Article I, Section 18;

C. a violation of plaintiff's right to a fair trial secured to him by the Constitution of South Carolina, Article I, Section 5; and

plaintiff brings this action pursuant to the laws of South Carolina.

6. **Prayers for Relief.** Plaintiff prays that this Honorable Court award one hundred thousand ($100,000) dollars in actual and punitive damages against defendants, plus costs, reasonable attorneys fees, and any other relief this Court might find to be just and equitable.

/s/ H. CHRISTOPHER COATES,
ROBERT R. MADAMA, JR.,
2016½ Green Street,
Columbia, South Carolina,
Attorneys for the Plaintiff.

[Verification omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Brett Allen Bursey, Plaintiff,

-vs-

Jack M. Weatherford, individually and in his official capacity as an agent of the South Carolina Law Enforcement Division; Pete Strom, individually and in his official capacity as Chief of the South Carolina State Law Enforcement Division; and other unknown agents and officials of the South Carolina State Law Enforcement Divisions, Defendants.

Civil Action No. 73-665

ANSWER

First Defense

The defendants admit that the plaintiff was convicted in general sessions court for Richland County, South Carolina, on or about July 27, 1970, of the crime of malicious destruction of real property, and that the defendant Weatherford did testify against the plaintiff at such trial; deny that the defendants conspired to obtain information about the defense strategy to be employed by the plaintiff at trial, or that any such information was obtained and given to the State's prosecuting attorney by any of the defendants; and deny the remaining allegations of the complaint.

Second Defense

The defendant Strom did not direct or order the defendant Weatherford with respect to any of the acts alleged in the complaint as to Weatherford, nor did he have knowledge of such acts.

Third Defense

If the defendants, or one of them, obtained information about the plaintiff's defense strategy and gave such information to the State's prosecuting attorney, as is alleged—which is specifically denied—such acts do not con-

stitute deprivation of a constitutional right of the plaintiff congnizable under Section 198 or any law of the United States.

Fourth Defense

If the defendants, or one of them, obtained information about the defense strategy of the plaintiff in the manner alleged, and gave it to the State's prosecuting attorney —which allegations are specifically denied—such acts do not constitute grounds for legal action of any kind against any of the defendants.

Fifth Defense

The allegations of the complaint do not contain sufficient facts to support the vague and conclusory claims that the defendants, or any of them, engaged in activity designed to, or resulting in, the obtaining of information relating to the plaintiff's defense strategy and the supplying of that information to the State's prosecuting attorney; therefore, the allegations of the complaint do not set forth a cause of action upon which relief can be granted in any event.

WHEREFORE, it is prayed that this action be dismissed.

DANIEL R. McLEOD,
Attorney General,

JOSEPH C. COLEMAN,
By: .....,
Attorneys for Defendants.

Columbia, S. C.,
July ...., 1973.

[Certificate of service omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Brett Allen Bursey, Plaintiff,

-vs-

Jack M. Weatherford, individually and in his official capacity as an agent of the South Carolina Law Enforcement Division; Pete Strom, individually and in his official capacity as Chief of the South Carolina State Law Enforcement Division; and other unknown agents and officials of the South Carolina State Law Enforcement Division, Defendants.

Civil Action No. 73-665

MOTION FOR SUMMARY JUDGMENT

The defendants move for summary judgment in their favor on the grounds that the complaint does not set forth facts to constitute a cause of action upon which relief can be granted against them.

/s/ DANIEL R. McLEOD,
Attorney General,
State of South Carolina,

/s/ JOSEPH C. COLEMAN,
Deputy Attorney General,
State of South Carolina,
Post Office Box 11549,
Columbia, South Carolina
29211,
Attorneys for Defendants.

Columbia, South Carolina,
September 6, 1973.

Encl.: (1) Affidavit of John W. Foard, Jr.
(2) Affidavit of J. P. Strom
(3) Affidavit of Jack M. Weatherford
(4) Trial Transcript

[Certificate of service omitted in printing.]

AFFIDAVIT

STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND.

PERSONALLY APPEARED JOHN W. FOARD, who, being duly sworn, says that he is the State's Prosecuting Attorney for General Sessions Court for Richland County, South Carolina, and that he personally prosecuted Brett Allen Bursey in that Court on July 27, 1973, for the crime of malicious destruction of real property.

The affiant further states that at no time was he furnished information by Jack M. Weatherford or anyone else about the trial strategy of Brett Allen Bursey and his defense counsel relative to the case, the trial, or anything else.

/s/ JOHN W. FOARD, JR.

SWORN TO before me this
27th day of August, 1973.

/s/ NINA B. JONES (L. S.)
Notary Public for South Carolina.

My Commission Expires: 2/12/ 80.

Encl: (1)

AFFIDAVIT

STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND.

PERSONALLY APPEARED J. P. STROM, a/k/a Pete Strom, who, being duly sworn, says that he is and was Chief of the South Carolina Law Enforcement Division before, during and after the trial of Brett Allen Bursey for the crime of malicious destruction of real property in General Sessions Court for the State of South Carolina, County of Richland, on the 27th day of July, 1970; that one Jack M. Weatherford was at such times an undercover agent of SLED; and that the deponent had general knowledge that Weatherford was engaged in investigating the activities of Brett Allen Bursey, but had no knowledge of any detail of such investigation.

The affiant further states that he has no knowledge whatever and has never had any knowledge of any information as to trial strategy of Bursey and his defense counsel being obtained by Weatherford and passed on to the State's prosecuting attorney or anyone else.

/s/ J. P. STROM.

SWORN TO before me this
25th day of August, 1973.

/s/ MARCIA I. BRAWLEY (L. S.)
Notary Public for South Carolina.

My Commission Expires: December, 1979.
Encl: (2)

AFFIDAVIT

STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND.

PERSONALLY APPEARED JACK M. WEATHERFORD, who, being duly sworn, says that on and before the 27th day of July, 1970, he was an undercover agent of the South Carolina Law Enforcement Division and that for some time before such date he was engaged in investigating certain activities of Brett Allen Bursey, and that at the trial of Bursey on such date he did testify against Bursey in a prosecution for malicious destruction of real property.

The affiant further states that he did not at any time discuss the trial strategy of Brett Allen Bursey with the State's Prosecuting Attorney or anyone else, nor did he impart any information about such trial strategy to anyone.

/s/ JACK M. WEATHERFORD.

SWORN TO before me this
22nd day of August, 1973

/s/ CHERYL LOWER (L. S.)
Notary Public.

My Commission Expires: February 15, 1977.

Encl. (3)

IN THE RICHLAND COUNTY COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA

State of South Carolina

-vs-

Brett Allen Bursey

TRANSCRIPT OF RECORD

Enclosure (4) Trial Transcript omitted.
See pages 342-366 of the Appendix for designated portions.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Brett Allen Bursey, Plaintiff,

vs

Jack M. Weatherford, individually and in his official capacity as an agent of the South Carolina Law Enforcement Division; Pete Strom, individually and in his official capacity as Chief of the South Carolina State Law Enforcement Division; and other unknown agents and officials of the South Carolina State Law Enforcement Division, Defendants.

Civil Action No. 73-665

ORDER

This matter is before the Court upon motion for a summary judgment by the defendants upon the grounds that the complaint does not set forth facts sufficient to constitute a cause of action. Such grounds normally are the basis for a motion for dismissal, however the parties have submitted affidavits in support of their positions and the

Court has treated this motion as one for summary judgment under Rule 56, as a case where there is no dispute as to any material fact.

The plaintiff is a citizen and resident of Richland County, South Carolina and has brought this action pursuant to 42 U.S.C. 1983 for monetary damages for alleged deprivation, under color of state law, custom and usage of rights, privileges and immunities secured to plaintiff by the Constitution of the United States. He invokes the jurisdiction of the Court under 28 U.S.C. 1343 and the pendant jurisdiction of the Court pursuant to the Constitution of South Carolina.

Defendant Weatherford is a resident of LaJolla, California, and plaintiff alleges that at all times material to this action, Weatherford was acting in his official capacity as an undercover agent for the State Law Enforcement Division (SLED) and these actions took place in the State of South Carolina. The defendant Strom is a resident of Richland County, South Carolina and is alleged to have been acting in his official capacity as Chief of the South Carolina Law Enforcement Division at times material hereto. Plaintiff also names as defendants "other unknown agents and officials of the South Carolina State Law Enforcement Division."

Certain facts seem to be undisputed and it appears that on July 27, 1970 plaintiff was tried and convicted by a jury in the Court of General Sessions of Richland County, South Carolina, of the crime of malicious destruction to real property occupied by the Richland County Selective Service Board. At this trial defendant Weatherford was called as the State's first witness. Up until the time of taking the stand, Weatherford had been a close friend of the plaintiff and defendant posed as being under indictment for the same charges arising out of the same incident producing plaintiff's indictment and trial. During this period of friendship, Weatherford had actually been a SLED undercover agent, unknown to plaintiff or his attorney.

Plaintiff alleges that Weatherford, at Strom's direction, by the false pretense of also being a defendant, sought

and gained admission to certain confidential communications between the plaintiff and his retained counsel, C. Rauch Wise, Esquire. Plaintiff contends that as a result of Weatherford's actions he learned of the defense strategies to be used in the criminal action pertaining to both legal and factual matters, and that Weatherford reported this information to the defendant Strom, who relayed it to the Circuit Solicitor, John W. Foard. Plaintiff asserts that these acts of the defendants violated his constitutional rights in three particulars: (1) as an illegal search and seizure under the Fourth and Fourteenth Amendments; (2) as a denial of his right to effective assistance of counsel under the Sixth and Fourteenth Amendments; and (3) as a violation of his right to a fair trial under the Fifth, Sixth and Fourteenth Amendments. Plaintiff also alludes to the corresponding provisions of the Constitution of South Carolina as a basis for recovery.

In answer, the defendants deny that Strom directed or ordered Weatherford with respect to any of the acts alleged in the complaint, and deny that plaintiff's defense strategy was relayed to the prosecuting attorney. Defendants assert that even if it was, this does not constitute a deprivation of any constitutional right.

All parties have submitted affidavits in support of their positions. The defendants furnished the affidavit of John W. Foard, who prosecuted the plaintiff, stating that he at no time was furnished information by Weatherford or anyone else relative to the trial strategy of the plaintiff or of any conversations between the plaintiff and his counsel. Strom's affidavit states that he had general knowledge that Weatherford was engaged in investigating the activities of the plaintiff, but denied the knowledge of any detail of such investigation or any knowledge of the gathering or the use of any information as to the plaintiff's trial strategy or defense.

The affidavit of C. Rauch Wise states that he met on one occasion with the plaintiff and Weatherford at which meeting possible witnesses and the involvement of an undercover agent were discussed. Wise stated that on the weekend preceding the trial he met with the plaintiff and

Weatherford and Weatherford assured Wise that he would not cooperate with law enforcement officials and would not testify against the plaintiff at the trial. The plaintiff, his attorney and Weatherford had discussed the probability of an undercover agent being in the case, since they did not know any other way the state could prove the plaintiff was at the scene of the crime. Wise also stated that trial tactics were discussed with and in the presence of Weatherford and that he was relieved to know that Weatherford would not testify for the state, since he did not know of any other agent or witness able to put the plaintiff at the scene. At the beginning of the trial the attorney made a motion for discovery of agents or informers, which was denied by the presiding Judge, the late G. Badger Baker. Attorney Wise affirms that when Weatherford took the stand as the first witness for the government he was taken completely by surprise and this substantially impaired his ability to conduct an adequate defense or cross-examine Weatherford.

The plaintiff's affidavit describes the manner in which he and defendant Weatherford became friends and how the plaintiff grew to trust Weatherford because of their mutual views and beliefs, and states that he and his attorney met with Weatherford on several occasions and discussed the possible agent involvement. He recalled a specific instance when the name of one Greg Merrick was mentioned as a possible agent. Plaintiff also describes the shock and sense of betrayal which overcame him when Weatherford took the stand to testify against him.

It is quite apparent that a factual dispute exists as to whether any information obtained by Weatherford concerning trial strategy of the plaintiff was relayed to the prosecuting attorney or used by him in preparing the case to the prejudice of the plaintiff.

Normally, under Rule 56 when a motion for summary judgment is made and supported by affidavits, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. In this case the defendants' affidavits state

that no information obtained by Weatherford was used at the trial or in preparation thereof. It is difficult to imagine that the plaintiff could come forth with affidavits to the contrary, since this type information would be known only to the defendants. However, the failure to file counter affidavits does not compel acceptance of the truth of the facts alleged in the affidavits of the moving party. *Subin v. Goldsmith,* 224 F. (2d) 753 (2nd Cir. 1955) cert. denied 350 U. S. 883 (1955).

The Court is not deciding the question of the credibility of the persons giving the affidavits, but the practical problem of the plaintiff's ability to prove the allegations of his complaint remains. This is not an instance where the Court should shut the door on the plaintiff's efforts to prove his case at this juncture of the proceedeings by deciding the issue on a motion for summary judgment. The plaintiff should be allowed to proceed with discovery in an effort to determine if he can prove sufficient facts to support his allegations.

This brings up the question of whether the facts as alleged by the plaintiff are sufficient to constitute a cause of action even if proved to be true.

It is recognized that suits under 42 U. S. C. 1983 are authorized to seek redress for violation of the right to remain secure from unreasonable search and seizure. *Sexton v. Gibbs,* 327 F. Supp. 134 (N. D. Tex.) affirmed 446 F. (2d) 904 (1971) cert. denied 404 U. S. 1062 (1972). The Ninth Circuit has held that allegations necessary to state a claim for unreasonable search and seizure are not insufficient unless it appears beyond doubt the plaintiff can prove no set of facts entitling him to relief. *Cohen v. Norris,* 300 F. (2d) pg. 24 (9th Cir. 1962). Also, this Court can perceive no reason why the Sixth Amendment guarantee of the right to counsel and the Fourteenth Amendment guarantee of due process are not likewise protected and subject to redress for violations under 1983. These rights are just as basic and fundamental as those guaranteed by the Fourth Amendment. If the plaintiff can prove facts which constitute an unreasonable search and seizure, or a denial of effective representation of counsel, or a denial

of due process because of interference with his right to a fair trial, then his claim is proper under 1983 and he is entitled to recover such damages as he may prove. This, of course, assumes that the defendants do not raise and prove some proper defense.

The use of a secret informer is not *per se* unconstitutional. *Hoffa v. United States,* 385 U. S. 293 (1966). In *Hoffa,* the petitioners were convicted of endeavoring to bribe a jury in the previous trial of petitioner Jimmy Hoffa for violating the Taft-Hartley Act. In the jury tampering trial, substantial information and evidence was given on behalf of the prosecution by one Partin, a paid Government informer, who throughout the Tart-Hartley trial was in Hoffa's company. The petitioner contended that his Fourth Amendment right had been violated by the failure of Partin to disclose his role as a Government informer. The Court upheld the admissability of the incriminating statements made to or in the presence of Partin by Hoffa, and in so holding reasoned that in making such statements, Hoffa had relied not upon the security of his hotel room (where the statements were made) but upon his misplaced confidence that Partin would not reveal his wrongdoing.

Subsequent to *Hoffa,* Supreme Court held in *Katz v. United States,* 389 U. S. 347 (1967) that the Fourth Amendment protects people rather than places, and that the reach of this Amendment cannot turn on the presence or absence of a physical intrusion into any given enclosure. Recently in *United States v. White,* 401 U. S. 745 (1971) the Court made it clear that the approval of Government informers still stands. At page 749 it states:

> "*Hoffa v. United States,* 385 U. S. 293 (1966) which was left undisturbed by *Katz,* held that however strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities. In these circumstances, 'no interest legitimately protected by the Fourth Amendment is involved', for that amendment affords no protection to a 'wrongdoer's misplaced belief that a

person to whom he voluntarily confides his wrongdoing will not reveal it'. *Hoffa v. United States* at 302. . . ."

The case of *Caldwell v. United States,* 205 F. (2d) 879 (D. C. Cir. 1953) is similar to the one now before the Court. Caldwell was convicted in the District Court for obstruction of justice and bribery. The Court of Appeals reversed the conviction holding that under the Constitutions' prohibition against unreasonable searches, and its guarantee of due process of law and effective representation by counsel, a Government agent's intrusion upon conferences between the accused and his lawyer invalidated the conviction. In *Caldwell,* the Government agent was hired by the prosecution while the accused was under indictment and awaiting trial. His assignment was to find out who was "behind" the alleged offenses as inciter or provider of funds. Soon after being hired by the prosecution, the agent was also asked to work for the defense in a number of matters arising in the preparation of the case. In this dual capacity as defense assistant and Government undercover agent, the informer conducted himself in such a manner that he gained free access to the planning of the defense. The informer continued to "aid" the defense throughout the trial and his double dealing was not discovered until six days after conviction. The *Caldwell* court left no doubt as to the grounds upon which it was reversing, stating at page 881:

> "On these basic facts, so stated, we think our decision in the *Coplon v. U. S.,* 191 F. (2d) 749 (D. C. Cir. 1951) is controlling. We there held flatly that 'The prosecution is not entitled to have a representative present to hear the conversations of accused and counsel.' (*Coplon* at 759.) More specifically, we held that the interception of supposedly private telephone consultations between accused and counsel, before and during trial, denies the accused his constitutional right to effective assistance of counsel, under the Fifth and Sixth Amendments. And the denial 'invalidates the trial at which it occurred and requires a verdict of guilty therein to be set aside, regardless of whether prejudice was shown to have resulted from the denial.' (*Coplon* at 759 . . .)"
>
> Footnotes omitted, citations added.

In *Hoffa* the Supreme Court distinguished both *Caldwell* and *Coplon.* The Court's opinion of the agent's activities which took place in those cases is candidly revealed in *Hoffa* at page 306:

> ". . . Both of these cases (*Caldwell* and *Coplon*) dealt with government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel . . ."

The present complaint does not allege conduct which would appear to be as obnoxious as that in *Caldwell,* where the agent continued his dual role throughout the trial. However, Weatherford testified as a crucial witness for the state, to the complete surprise of the plaintiff and his counsel, and after advising them that he would not be a witness. For the purposes of this action. a factual question still exists as to what degree, if any, the plaintiff's constitutional rights were prejudiced by Weatherford's actions prior to the trial.

In *Caldwell* the same constitutional grounds as those of the present plaintiff were raised. It makes no difference that *Caldwell* and *Coplon* involved federal agents. The Fourth Amendment is applicable to state prosecutions through the Fourteenth Amendment, *Mapp v. Ohio,* 367 U. S. 643 (1961); as is the Sixth Amendment. *Gideon v. Wainwright,* 372 U. S. 355 (1963). The Fourteenth Amendment by its explicit language prohibits the state from denying due process of law.

This Court does not condemn the use of informers or undercover agents, but *Caldwell* makes it clear, even when read together with *Hoffa,* that there is a point in time after a defendant has been indicted and is awaiting trial and preparing his defense, that an informer should and must withdraw from the picture so as not to prejudice the defense or so compromise it as to deny a defendant the right to a fair trial or effective counsel.

The Court concludes that the plaintiff has alleged facts sufficient to state a cause of action and that there are genuine issues as to material facts which prevent the granting of a summary judgment, and therefore the motion is denied.

AND IT IS SO ORDERED.

/s/ ROBERT F. CHAPMAN,
United States District Judge.

October 31st, 1973,
Florence, South Carolina.

Civil Action No. 73-665

Columbia, South Carolina
June 10, 1974

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
(COLUMBIA DIVISION)

BRETT ALLEN BURSEY, PLAINTIFF,

versus

JACK M. WEATHERFORD, *et al.*, DEFENDANTS.

BEFORE:

HONORABLE ROBERT F. CHAPMAN, United States District Judge.

APPEARANCES:

LAUGHLIN MCDONALD, ESQUIRE, Attorney at Law, 52 Fairlie Street, N. W., Atlanta, Georgia; HERBERT E. BUHL, III, ESQUIRE, Attorney at Law, 2016½ Green Street, Columbia, South Carolina, for Plaintiff; J. C. COLEMAN, ESQUIRE, Deputy Attorney General, State of South Carolina, Columbia, South Carolina, for Defendants.

[Transcript of Record, Pages 1-275]

The COURT: Gentlemen, are you ready to proceed in 73-665?

(Parties announce ready to proceed.)

The COURT: All right. You may proceed. I have read the pleadings and understand the case. You can start with the testimony.

Mr. Brett Allen Bursey, the plaintiff, first being duly sworn, testified as follows:

Direct Examination

By Mr. MCDONALD:

Q. Would you state your full name, please?

A. Brett Allen Bursey.

Q. And Mr. Bursey, are you the plaintiff in this action?

A. Yes, I am.

Q. Mr. Bursey, I want to ask you a few questions about your general background. Can you tell me how old you are and when you were born?

A. Yeah, I'm twenty-five, and I was born on the fifth day of September, 1948.

Q. And where do you presently live?

A. 305 Heyward Street, in Columbia, South Carolina.

Q. How long have you resided at that address?

A. Since last October.

Q. How long have you lived in South Carolina?

A. Since the fall of 1967, with the exception of a period of about a year and a half, I was out of the state.

Q. Were you born in South Carolina?

A. No, sir, I wasn't.

Q. Where were you born?

A. Arkansas.

Q. And when did you move into this State?

A. In 1964. My father was—I'm a military dependent, or was, and he was transferred to the Marine Station, at Parris Island.

Q. All right, now, tell me briefly what your educational background is. Did you finish the public schools?

A. I graduated from high school in Beaufort, South Carolina; went to the University of Georgia for a year and a half and transferred to the University of South Carolina in 1967 and went there '67, '68, '69 and '70.

Q. What was your major in college?

A. Political Science in International Studies.

Q. Did you take a degree either in Georgia or South Carolina?

A. No, I have not.

Q. Now, when you were a student at South Carolina, did you belong to any student organizations or participate in any extra-curricular activities?

A. Yes.

Q. Can you tell me what these organizations or extra-curricular activities were?

A. Well, the organization that I was most active in was an organization known as AWARE.

Q. Can you tell me what AWARE was?

A. Well, it was and still is a—more or less a discussion group that is composed of students. It's a university-chartered recognized group that deals with talking about ways to implement needed social change and reform and discussions as to what that might constitute.

Q. Did the organization have any programs other than just discussion?

A. The program is flexible. It was more discussion than action.

Q. Did you hold any office in this organization or position of leadership?

A. Well, during one semester, I recall being in a position of co-Chairman.

Q. Who were the other Chairmen?

A. Well, Jack Weatherford was one of them.

Q. The Jack Weatherford who is the defendant in this action?

A. Yes, sir.

Q. Were you a member of any other student organization during your time as a student at the University?

A. No, sir.

Q. Did you have an affiliation with any student government organizations?

A. Oh, yes. I was a member of the student government during the fall semester, 1969.

Q. What was the nature of your membership of the student government?

A. I was a Student Senator, elected to represent off-campus students.

Q. And when were you a senator? What were the dates of your—

A. Well, the fall of '69 was the date I took office.

Q. All right, sir, you mentioned that Mr. Weatherford was an officer of the AWARE group. Can you—did you meet Mr. Weatherford as a result of your mutual interest in this organization or had you met him prior to that?

A. I remember meeting Mr. Weatherford in late summer or early fall of 1969, in August or September. I remember seeing him and—him more or less just coming into my life at that period of time around the University and at AWARE meetings, most speecifically.

Q. All right. Now, would you explain to me the nature of the relationship which you had with Mr. Weatherford?

A. Well, that relationship varied at times. It became more complex than it was at first. Initially, I met Mr. Weatherford, I guess, through a mutual professed belief in some of the same things, such as the War in Vietnam was wrong; a rejection of racism; and a desire to see some social changes brought about in this country. Mr. Weatherford expressed similar feelings to mine and was relating it at that time to an organization that was dealing with the ideas that we both mutually expressed at that time. I remember seeing him at the UFO Coffee House, which was an anti-war coffee house on Main Street, in Columbia, South Carolina, at that time. When that fall semester of school started, Mr. Weatherford began attending the AWARE meetings, which were held weekly in the Student Union of the Russell House. That was a time when the War in Vietnam was going on very heavily, and there was a lot of sentiment about it, and I think that was specifically a tie that bound a lot of people together at that time, was the rejection of that war.

Q. Let me direct your attention, if I may, Mr. Bursey, to the period of time prior to March 20, 1969. I believe

you testified that you knew Mr. Weatherford prior to that date? Is that correct?

A. Yes.

Q. Now, I want you to tell me the sort of relationship you had with him prior to that date, and I would like you specifically to tell me whether or not you had a social relationship with him, as well as the political relationship you have just described?

A. Yes, I considered Jack a close friend, one of a handful of people that I related with socially and politically and saw him quite often—three, sometimes five times a week. At that time, there were more than just that weekly meeting. There were other functions and discussion groups going on, and we were likely to see each other many times during the week, as well as seeing each other over coffee or perhaps at my house. I recall him being at my house several times, and I recall myself being at his house a few times, and—but seeing each other with regularity during that time and considering Jack a friend. And that's the—was a period of almost seven months which we are talking about now, after I had met him, and I feel that—my recollection is that by March 20, I considered Jack one of my better friends at the University.

Q. Do you know whether or not he was enrolled at the University during this seven months' period?

A. It's my recollection that he was enrolled in the Department of Sociology.

Q. All right, can you tell me what role you observed he played in the AWARE organization? You stated that he was a co-Chairman. Did he have an active role or a passive or what did he do?

A. Well, he was in a leadership position, which I think would mean it was not a passive role. I recall times coming into a room and hearing Mr. Weatherford talking about the War in Vietnam. I don't really ever recall Mr. Weatherford taking a leading position on anything, formulating any policy, but I don't recall him not saying anything. I recall him inter-reacting but not taking a leadership role in the sense of formulation of policy, but he was inter-reacting and expressed opinions on certain things,

like the War in Vietnam and racism, and was, I think, through virtue of being one of the older people involved and had been in school for long enough to have a clear awareness of what was going on in Vietnam, in a leadership position in the sense that a lot of the people who were in AWARE were much younger.

Q. Did you have occasion to plan with Mr. Weatherford and others a demonstration before a local Selective Service Board, in Columbia, prior to March 20?

A. Yes.

Q. Can you tell me what the nature of the plans were and the role, if any, which Mr. Weatherford might have played in them?

A. Well, the occasion for such a demonstration was that it was "National Anti-Draft Week," and it was a demonstration that arose out of people's opposition to the War in Vietnam and feeling that the draft to serve such a purpose was illegal and immoral; and people in AWARE, in the Columbia area, wanted to do something to express their opposition to the War and to the draft. There was open discussion as to how that opposition should be manifested. I recall myself putting forward an idea of a theatre skit, going into the Draft Board in the daytime and tacking up a notice on the door, condemning it as a health hazard, much for the same reasons as the UFO Coffee House had several months earlier been padlocked and condemned; that we would—it was discussed perhaps in conjunction with a group of inductees being taken to Fort Jackson; and I recall there were no such groups passing through, and the discussion changed, I think, when there were fewer people willing to do a theatre group, and there was no inductees going through, the discussion changed to doing something of a more clandestine nature, I think you might say, at night with—the plans were to have a symbolic demonstration in the evening with—I think—what resulted was a broken window, some red paint thrown on the files and a note condemning the Selective Service System and its function and a couple of peace slogans painted on the wall. And Mr. Weatherford was an active participant in the planning and the carrying out of that incident.

Q. What was the nature of your participation in the planning and execution of this scheme?

A. As active as anyone else's. Perhaps by virtue of my strong opposition and being at the University a little longer than other people that were involved in the group, I think that perhaps I was placed in a position of leadership, but I certainly don't recall giving orders. I think that the group evolved—the action evolved out of just a group consensus as to what to do. Mr. Weatherford was part of that consensus, as was I.

Q. You had an opportunity to observe the role which he played in the planning and execution of the scheme?

A. Yes.

Q. Can you describe the role which he played in the execution and the planning of this demonstration before the Draft Board?

A. Well, the discussion originated at the University, talking about "National Anti-Draft Week," talking about doing a theatre action, and people who were interested in that later met at a local restaurant to further discuss their plans. Mr. Weathereford was at the first meeting at the University; later at the meeting at the restaurant; and the five or six people that were involved in the incident later met immediately prior to the incident at a house here in Columbia. Mr. Weatherford was there, and the—I believe there were four people that went to the Draft Board, and Mr. Weatherford was one of them.

Q. Can you tell me what happened at the Draft Board on March 19, 1970?

A. Well, a note had been drafted—

Q. I mean 1969.

A. Yes. A note had been drafted prior to going to the Draft Board, condemning the Selective Service System and the role that it played in the War in Vietnam. That note was taped to a brick, and there was a bottle of red paint, and there were several spray cans of red paint. Mr. Weatherford had one of the cans of spray paint, and I had one of the cans of spray paint, and another member of the party had the brick and the bottle. The brick was thrown through the window with the note on it, and the bottle

was thrown through the window with the paint in it. Mr. Weatherford and myself decorated the outside of the building with some anti-war graffiti, and we left.

Q. Did you tell me who threw the bricks?

A. A fellow named Merrick.

Q. And did you throw a brick?

A. There was only one brick in the office. Mr. Weatherford and I—I think—both had bricks, but I don't think we threw them, or they didn't—they weren't thrown at the office or something. There was only one brick thrown and that was the one that had the note on it.

Q. And that was thrown on—

A. Through the window.

Q. And you painted something on the outside of the building?

A. Yes.

Q. What did you paint?

A. I painted a slogan saying, "Hell, no, we won't go."

Q. And did you observe whether or not Mr. Weatherford painted anything on the outside of the building?

A. I saw him paint the word, "Peace," and a peace symbol, anti-war symbol that's indicative of "Stop the bombing," and—I saw him paint that.

Q. How many of you were actually at the Selective Service Local Board?

A. Four—at the building physically itself? Three of us.

Q. And that would have been who now?

A. Myself, Jack Weatherford and Greg Merrick.

Q. Was there a fourth party involved?

A. Yes, the fourth party never left the vehicle, which was parked two blocks away.

Q. What's the name of the individual who was in the car?

A. Dan Bolding.

Q. All right, did either Mr. Bolding, Mr. Merrick or Mr. Weatherford suggest that you should not do what, in fact, you did on March 19?

A. No, I don't recall any restrictive comment from any of the members involved in the incident, no.

Q. You have told me there were several things that the group that was involved at various times in this demonstration had discussed doing: talked about a skit and writing the graffiti and throwing in the paint through the window. Were there any other suggestions as to what you might appropriately do to register your protest against the war?

A. I'm sure that at that time, there was an awareness amongst the members of the group that the devastation that was going on in Vietnam, that there would be no real way we could fight back and make our protest significant in comparison to what was going on in Vietnam; and I'm sure that it was—the subject of blowing the building to the ground was broached but never considered in a serious fashion.

Q. Did you suggest—

A. Fire-bombing or blowing it up or something might have been mentioned.

Q. By whom?

A. By anyone in the group, I'm sure, that—in such a setting, especially sitting down, talking casually about doing something, someone might say, "Let's blow the place up," but there was never any overt act taken to further anything other than what happened.

Q. Did you ever seriously consider blowing the building up or fire-bombing it?

A. Did I personally ever consider it?

Q. Yes.

A. No. No.

Q. All right, now, tell me what happened—well, when did—how long did the demonstration take place on March 19?

A. How long did it take for us to do what we did at the Draft Board?

Q. Right.

A. Three minutes.

Q. What time of night was that?

A. After midnight, one o'clock.

Q. Actually, it was on March 20?

A. Yes.

Q. Where did the four of you go after you finished doing what you did at the Draft Board?

A. Mr. Merrick was dropped off at the University, and Mr. Weatherford, Mr. Bolding and myself went back to the house that we had been at earlier.

Q. What happened at the house when the three of you went there?

A. Well, there was no discussion of the incident. I recall that we were there for a little while longer, maybe thirty minutes longer, and then people went home.

Q. And did you go home?

A. Yes, I did.

Q. All right, tell me what happened after you went home.

A. I went to bed.

Q. And what did you do the next day?

A. I got up and went to the University, where there was a scheduled hearing with the Student Affairs Committee, which is a committee composed of students and faculty members and administrators at the University, that regulates the affairs of student organizations, and there was a hearing that day before the Student Affairs Committee to determine if the organization AWARE should retain its charter, the question being was the group—was their purpose constructive; and myself and other officers of AWARE, Jack being included, were present at that meeting.

Q. Did AWARE retain its charter?

A. Well, that meeting was interrupted, and the ultimate outcome of that meeting has always been in doubt in my mind. AWARE became defunct more or less after that as an approved organization but continued to function in some capacity. I'm not sure exactly how the University related to AWARE.

Q. You don't know whether or not the University revoked its charter?

A. I don't know if that for sure happened.

Q. All right, you say that the meeting was interrupted. Can you tell me why it was interrupted and how?

A. Well, law enforcement officers came into the room and arrested myself and Mr. Weatherford.

Q. Did you recognize or know any of the officers?

A. Yes, sir, there were Sonny Clark, agent of Richland County was there; Mr. Gasque, an agent of SLED, was there. There were other agents involved. I can't recall their names.

Q. Now, would you tell me how they made the arrest?

A. Well, they just came into the room rather briskly and physically restrained me, put me against a wall and searched me. I recall distinctly one of them saying, "That's Weatherford," and then them arresting and searching Mr. Weatherford. During the course of the arrest, they found an aerosol container, small aerosol container of chemical repellent in my pocket, which could be purchased at any number of area drug stores in Columbia.

Q. Why did you have that with you?

A. Well, I had—at that time, immediately prior to that, at the University and in the City of Columbia, had rather direct verbal and physical assaults on my being and was concerned for my safety, and being basically a pacifist would hope that would prevent me from becoming involved with some altercation that could lead to physical harm.

Q. Was it a tear gas cannister that you had?

A. An aerosol container of some chemical which could possibly have been some form of tear gas, yes.

Q. All right, now, did you have any conversation with Mr. Weatherford during the arrest?

A. Well, Jack and I were handcuffed together, and I recall distinctly holding hands with him. We were cuffed together and held hands, and I don't recall there being much conversation, other than the fact that we should both remain silent and seek counsel, and I advised Jack to do so, and he agreed that he would.

Q. Why were you holding hands?

A. We were handcuffed together and being pushed around, and the handcuffs were pulling and we held hands for comfort, I guess you might say.

Q. After you were arrested, were you taken anywhere?

A. To the Richland County Police Department, the Sheriff's office.

Q. And how were you taken?

A. We were taken together in a car.

Q. You and Mr. Weatherford?

A. Yes.

Q. Did you have any conversations in the car on your way to the lock-up?

A. I don't recall any other than saying that we should remain silent and get a lawyer.

Q. Did Mr. Weatherford say anything which led you to believe that he was a SLED agent at that point?

A. No, sir. We were handcuffed together; we were being treated the same. I had no reason to believe he was anything but my co-defendant at that point.

Q. All right, sir, what happened after you were taken to the jail?

A. Well, I was placed in a room by myself and did not see Mr. Weatherford until I got out of jail again.

Q. When did you get out?

A. Twelve days later.

Q. Why were you in there so long or why were you in there for twelve days?

A. Well, it took that long to raise the bond. The bond, I think, was twelve thousand or twelve thousand five hundred dollars. The charge specifically was malicious mischief for the destruction of the Draft Board, which is a misdemeanor, and I was charged with possession of a tear gas gun and/or machine or parts thereof, under a State statute, which referred to the aerosol container found in my pocket.

Q. And after you posted your bond, were you released?

A. Yes, sir.

Q. Now, during that period of time, did you have any information as to the disposition of Mr. Weatherford? Did he visit you during this period of time?

A. No, but I knew that he had—well, what I knew at the time was that he had made bond and had gotten out.

Sonny Clark came to see me and told me that Jack had gotten out, and I think—a couple of days, I think Jack was—reportedly stayed in jail a couple of days before his bond was made or a day and a half or something like that.

Q. When did you next personally have an opportunity to see Mr. Weatherford?

A. Shortly after I got out. Twelve days after the arrest.

Q. Did you meet with him and talk with him?

A. Oh, yes.

Q. Will you tell me the circumstances of that meeting, where you were, who was present and what was said or discussed?

A. Well—

Mr. COLEMAN: Your Honor please, what date was this?

The COURT: He said about—several days after he got out of jail. He didn't name a date.

Mr. MCDONALD: No, sir, he did not.

Q. Do you recall specifically the date?

A. No, sir, I do not. I recall the incident, the meeting at a mutual friend of ours house, a woman named Barbara Herbert, who was also active in AWARE, and I recall seeing Jack and embracing him, and there was a great deal of camaraderie, and the discussion followed about how Jack got out, who his lawyer was, details of how he got his bond.

Q. Will you relate to me what he told you were the details of his getting out on bond?

A. Well, Jack said a friend of his, which I guess we could call a family friend, a man named Hardwick, Dr. Hardwick, who was someone I knew Jack was friends with —I had been to Dr. Hardwick's house when Jack was there babysitting for the Hardwick family—and it was reasonable when Jack told me that Dr. Hardwick had posted his bond and provided—Dr. Hardwick provided his counsel, Frank Taylor, for Mr. Weatherford. And so, I was told that Dr. Hardwick posted Mr. Weatherford's bond and Frank Taylor was his counsel.

Q. Did Mr. Weatherford say how much his bond was?

A. I think I recall it being seven thousand dollars.

Q. Did he tell you how long he had been in jail following his arrest?

A. Two days, but I don't know if that was two nights. I don't know if he spent two nights in jail or whether it was just one night, constituting two days—the two days.

Q. Did he tell you that was the time he spent in jail?

A. Yes, he did.

Q. Now, you mentioned that he told you that he had retained Mr. Frank Taylor. Have you told me everything about what he said about his efforts to retain counsel?

A. Well, there was no great effort on his part, from the way Mr. Weatherford explained it, in that Mr. Taylor was the attorney for Mr. Hardwick; and after Jack was arrested, Mr. Hardwick being interested apparently in Jack's welfare, offered Mr. Taylor's services for Mr. Weatherford.

Q. All right. On that occasion, did you discuss your own case with Mr. Weatherford?

A. Well I'm sure that we did. We were—after the arrest and after I got out of jail, Jack and I became closer than we had before and saw more of each other. I think that it's fair to say that we related completely openly about the case and being co-defendants, and as far as the legal aspects of the case, I recall discussions to the fact that Mr. Taylor had suggested that they file a motion for severance —is that the term—to be tried separately, and that we would not be tried together, because Mr. Taylor thought that it would be incriminating for Jack to be tried with me, and that I never did expect Mr. Weatherford to go to trial with me. And we both hoped that Mr. Taylor would be able to prevent Mr. Weatherford from ever coming to trial. That's where I understand a good trial lawyer does his best work, is before trial, in preventing his client from ever going to Court; and we had hoped that that would be the case with Mr. Weatherford, and I recall discussing with Jack that they wanted me more than they did him, and that my role at the University in the anti-war actions there had been a little more vocal than his, and that perhaps he would be able to get off and discussing the ramifications of the arrest in regards to his brother, who was in

prison at the time. Jack expressed concern that the arrest would have a negative effect on his brother being able to get out early. His brother was serving a sentence for burglary, I believe—an eight-year sentence for burglary, and was in the South Carolina Department of Corrections, and Jack was concerned that his arrest would have some negative effect on that. I recall him discussing at length that concern.

Q. Did you attempt to retain counsel following your release from jail?

A. Yes, I did. I called Mr. Rauch Wise, an attorney in Greenwood, and asked him if he would represent me, and we made arrangements for me to travel to Greenwood to discuss the case with him, and subsequently, he did take the case.

Q. Did you privately retain Mr. Wise?

A. Yes, I did.

Q. Did you have occasion ever to meet with Mr. Wise when Mr. Weatherford was present, following your release from jail and prior to the trial of your case?

A. Yes, sir.

Q. How many times did you meet with Mr. Wise and Mr. Weatherford-

A. My recollection is specific on two instances, being, I guess the two where—that were most formal in the sense of discussing legal matters, and—should I go into that?

Q. Tell me about the first of these instances and identify as best you can as to the time and place.

Mr. COLEMAN: Did I understand the witness's explanation of the meetings being formal or informal—would you have him repeat that?

Q. All right, sir, you said that you had some meetings and two stuck out in your mind as being formal. Would you explain the term, "formal"? What do you mean by that?

Mr. COLEMAN: I simply didn't understand. You said, "formal."

A. What I meant by that was that there was a period of four months between the arrest and the trial; and during

that period of time, I saw lot of Mr. Wise and I saw lot of Mr. Weatherford, and many of the times—well, let's say several events, we were all three present at the same time. Two specific events stick in my mind as being—let's say an attorney-client relationship, when we were discussing aspects of the case. Other occasions, we would have perhaps mentioned the case, but it may have been on a more social basis, but there's two specific times we sat down and talked about the case.

Q. Tell me about the first of these times, when it took place, as best you can recall, and who was present and what was said.

A. Well, the first time was shortly after I got out of jail after the arrest, and I retained Mr. Wise. I had been to Greenwood and talked to him about the case and had invited him to come to Columbia to meet Jack. Mr. Wise had expressed a desire to meet all the people involved in the case, and I made arrangements for Mr. Wise and Mr. Weatherford to come to my house. I was living in the country, outside of Columbia, at that time. Mr. Wise came from Greenwood, and this would have been around the middle of April, perhaps around the—between the second and third week in April, because I was arrested March 20 and spent twelve days in jail, and it was perhaps a week or two after that. So, let's say it was between the fifteenth and twentieth of April. Mr. Wise came from Greenwood, and Mr. Weatherford came out to my house, and I introduced them, and we proceeded to discuss all the aspects of the case that we were all aware of, which would have been the totality of everything. We just discussed everything.

Q. Who was present at that meeting, other than the three people you have named?

A. There was no one else involved in the conversation. I don't think there was anyone else at the house there at first. Some people may have come in later. I don't know if my wife or—Walker was there, but I recall the three of us speaking alone.

Q. Where did you have the conversation?

A. In front of the house, a little pond there. I recall sitting next to the pond, talking about the case.

Q. All right, tell me, if you can remember, specifically what you talked about.

A. Well, I'm sure that we just went over the events as we recalled them, and postulated. I think all of us were postulating at that time that there was an informant involved in the matter. I think that that postulation was prompted by the fact that we were arrested the next day, immediately after the event, and led us to believe that there was an informant; and I think that suspicion centered around the Merrick fellow, the third person at the Draft Board, who was not picked up, not arrested, was not questioned, and suspicion centered around him, and I recall Mr. Weatherford agreeing that Merrick could be the agent. I think it was discussion at that time about who Mr. Weatherford's counsel was. Mr. Taylor's name was brought up; the idea that Mr. Taylor would move for separation between the two of us and that Mr. Weatherford would be tried separately.

Q. Did Mr. Weatherford say anything which indicated that he was the Government informant?

A. Oh, no, sir. No, sir.

Q. Did he say anything to indicate that he was not?

A. Yes. Yes. I had every reason to believe that Jack was my co-defendant.

Q. Did you discuss with your attorney, when Mr. Weatherford was present at this occasion the possibility of trying to bargain for a plea—bargain for a sentence, attractive sentence, based on a plea of guilty?

A. Well, that was brought up. I don't recall considering it. I know that we did talk to Jack about the possibility of him being approached by law enforcement representatives with some type of deal: State's evidence or perhaps some type of deal that might involve his brother, his brother's release, and Jack categorically denied that he had been approached and asserted that he would not cooperate with law enforcement agencies, and I felt Jack to be very sincere in that.

Q. Did you discuss what you thought the State's evidence would show at this meeting?

A. Well, I'm sure that in going over all the events and in trying to figure out who the agent was, if there was one, we postulated that if Merrick was an agent, they would know so much; and if he wasn't, they would know so much; and we just openly discussed all aspects of the case. That was discussed, yes.

Q. Did you have occasion to see Mr. Merrick after your release from jail?

A. He left town, and I recall talking to him weeks later, but he was not to be seen much again after that.

Q. Was he a witness at your trial?

A. No.

Q. Did you have a preliminary hearing in connection with those charges against you?

A. Yes, I did.

Q. Was he a witness at that preliminary hearing?

A. No, he wasn't. He was never approached by—he said he was never approached by law enforcement officers.

Q. All right, you have told me about the first meeting you had with your attorney when Mr. Weatherford was present. I believe you said that was another formal meeting that stuck out in your mind. Will you tell me when that took place and where and who was present and what was said?

A. Well, that meeting was right before the trial; perhaps a week prior to the trial, a matter of days before it, in July—the trial was what—the twenty-seventh?

Q. I believe the record will reflect the trial was July 27.

A. So, it would have been perhaps between the 20th and 25th, and the meeting was at a house rented by the then Walker Maybank, and I recall meeting there with Jack, with—Walker was there; her children were there; Rauch Wise was there; and my wife was there. I recall the incident, the day, very clearly. It had been raining. Rauch and I were there, and Jack was out, and he came in with some type of carry-out lunch—I don't recall whether it was fried chicken or what it was—and he was wet, his hair was wet, and he said that he helped push somebody

whose car was stalled where he went to get the meal, and we discussed all the aspects and considerations of the case. We had at that time a date to proceed on the trial, so we knew it was coming. At that point, I guess it was more immediate in our minds than it had ever been. We had a date for it and were going to trial. We knew that Jack would not be tried with me.

The COURT: Wait a minute. You say you knew that. Had the severance motion been granted? You said that a severance motion was going to be made.

The WITNESS: Yes, sir. I don't know if there had been a motion made and granted, but I recall being aware that I was the only one going to be called.

The COURT: How were you made aware of that?

The WITNESS: I believe my attorney told me, and my recollection is not clearly specific—legal awareness. I may have drawn that inference from what Mr. Weatherford told me and what Mr. Wise had told me, but we weren't expecting at that point Mr. Weatherford to be tried with me.

Q. Were you tried alone?

A. Yes.

Q. And Mr. Weatherford's case was not called for trial on the 27th when you were tried?

A. No, it was not.

Q. Now, again, I don't want to be repetitive, but this is a second meeting, so I want you to tell me everything that you discussed—

A. Everything we discussed—

Q. —in the presence of Mr. Weatherford, with your attorney, at this second meeting.

A. I am sure that everything that was discussed at the first meeting was again gone over, plus whatever legal ideas or strategies or tactics we had been able to determine from the things that we had learned or Mr. Wise had learned in talking to all the people involved in the case. I think that I could add at this point that Mr. Weatherford was totally in our confidence. We had no restraints about discussing the case with him. We assumed that he was a co-defendant and that he shared some liability in the matter; and we were concerned as well about his well-being and involved Mr. Weatherford in our discussion with that in mind.

Q. Did you discuss who the witnesses would be against you and who you might call as witnesses at the trial?

A. Yes, sir, and I think we had found out by that time that the third party that was physically present at the Draft Board, Mr. Merrick, would be out of the country in Europe at that time, and so we knew that no one but Jack Weatherford could actually place me at the Draft Board, and I'm sure that was discussed. I recall very specifically again talking about Jack's brother. Jack had already told me by this time of a incident when he was indeed approached by law enforcement officers with a deal, and so, I knew that overtures had been made to Jack. We discussed those. Jack again emphatically denied that he would cooperate with the law enforcement officers. And I just think that at that time, Jack and I were very close, and a feeling of brotherly bond there, in the sense of sharing; not only the same motivations and perceptions about certain things, but having a common tie in the arrest and what we were going through, the kind of common bond there between us that made us closer.

Q. Did you discuss whether or not he, Mr. Weatherford, would testify?

A. Yes, sir. Yes, sir, and I remember Mr. Wise asking Mr. Weatherford not to be present in the courtroom, not to come just as a spectator, and Mr. Weatherford saying that he would.

Q. And did you discuss whether or not you would testify at your trial?

A. Yes, sir, we discussed the propriety of my testifying and decided that it would not be a good idea for me to get out on the stand, and that I could add nothing and would open the cross-examination field for a whole range of things that might be prejudicial in the eyes of the jury.

Q. Was the decision that you would not testify based on what you regarded as—well, did it have anything to do

with Mr. Merrick not being available for trial and Mr. Weatherford not testifying?

A. Well, yes, sir. If there was no one to testify that was at the scene of the—quote—crime, then there would be nothing to gain by my being put on the stand and opening myself up for questions about the specifics of the incident.

The COURT: What about the fellow driving the car?

The WITNESS: He was not at the Draft Board. He was two blocks away and never did see anything. He could say he carried us to the Draft Board, let us out and picked us up later, but not the specifics of what had happened there.

Q. The driver of the car, did you tell us his name?

A. Dan Bolding.

Q. Now, did he testify at the trial?

A. Yes, sir, I believe he did. He also testified at the preliminary hearing.

Q. Now, did you testify at your own trial?

A. Yes, sir, I did.

Q. And can you tell me why you did that?

A. Well, after the first witness for the State was introduced—that was Jack Weatherford, and Mr. Weatherford said that—the first question was, "Mr. Weatherford, how long have you been an agent for the South Carolina Law Enforcement Division?" He said, "About a year and a half," and I would say our tactics had to undergo considerable change at that point; and we felt that after Mr. Weatherford got up and said, "Yeah, I was there; I saw him do it," and all that, it was a pretty cut and dry issue; and what was necessary for me to do at that point was to inject some degree of human considerations into why we did it and to try and convey that we did not consider it to be malicious, and to try and express my motivations for doing it. I got on the stand and admitted doing the damage and that certainly would not have happened, had Mr. Weatherford not been an agent and had not testified.

Q. Had you discussed with your attorney the possibility of entering a plea to the charge against you?

A. It was discussed, but I think that it was never seriously considered. I don't think there ever was a good deal made.

Q. Now, was Mr. Weatherford present during any of those discussions that you had with your attorney about entering a plea?

A. The meeting at Miss Maybank's house, prior to the trial, we did discuss the possibility of a plea, my rejection of such.

Q. Why did you reject that possibility?

A. Well, at that point, I thought we had a fighting chance in the trial in the sense that we didn't—Mr. Merrick wasn't going to be there, and Mr. Weatherford certainly wasn't an agent. There was no one could actually place me doing damage to the Draft Board. We were going to try to contest it.

Q. Had you known at that time that Mr. Weatherford was an agent, would your attitude about exploring a plea have been any different?

A. I believe so.

Q. Were you given an opportunity to plea bargain following the revelation that Mr. Weatherford was an agent?

A. I recall Mr. Wise telling me that the Judge would give me two years if I plead guilty.

Q. And were you convicted?

A. Yes, sir, I was.

Q. And what was your sentence?

A. A year and a half.

Q. This second meeting, I don't believe you told me how long it lasted, the one immediately prior to the trial, the meeting attended by you and Mr. Weatherford and Mr. Wise.

A. It was not a short meeting. It took enough time to eat the food that Mr. Weatherford had brought back and to have—to conduct the meeting in an affair of not being rushed. I couldn't say. It was certainly between an hour and three hours. I don't recall.

Q. All right, sir, what about the first meeting? How long did it last?

A. It was a longer meeting. I recall it lasting for at least a couple of hours.

Q. Now, you stated that you had occasion to meet with Mr. Weatherford and Mr. Wise on a less formal basis after your arrest and prior to trial, and you also—well, tell me about those meetings, if you can, where they were and what the occasion was?

A. It's been a long time, and the four months between the arrest and the trial, Mr. Weatherford and Mr. Wise were mutual friends of mine and I assume each other, and I think that we would have had occasion to see each other socially—one event may have been an ACLU party—but I can't recall any specifics that I could swear to, other than the atmosphere of friendship that prevailed between the three of us.

Q. Did Mr. Weatherford give you any advice about what you ought to do in connection with the charges against you?

A. Yes, sir.

Q. What did he tell you, advise you to do?

A. Split, meaning to flee. As a matter of fact, I recall coming back—we had been in Atlanta immediately prior to trial, and I recall when we returned, Jack said that he was surprised to see us. He thought we would be long gone.

Q. Mr. Bursey, when Mr. Weatherford revealed his identity at your trial, tell me what your own reaction was, if you had a reaction?

A. That's difficult if not impossible to define. It was such an overwhelming thing that it was—I don't recall reacting to it. It didn't compute. I mean, myself and others just couldn't believe it. This was somebody that I had known for almost a year, spent a lot of time with, and—well—after the arrest, we—well, Miss Walker—I don't exactly know who she is now—but Walker had been—the woman who was living with Jack—had been my wife's roommate in Charleston, and we had introduced them; and from the time of the arrest until the time of the trial, they were living together, and Walker had two kids, and we

were just very close to them and had presented Jack to Walker as someone—she had just split up with her husband and had affirmed that she didn't want to have anything to do with men because they were a sordid lot, which I tend to agree with, and introduced her to Jack as somebody who was not in that realm, as someone who was a very considerate and sensitive person to the needs of women, and apparently Walker agreed, because she and Jack struck up a relationship; and to my knowledge, during those months prior to the trial, Walker never knew that Jack was an undercover agent. I mean, she was apparently in love with Jack for what I regarded Jack to be my friend for, for him being a concerned individual and sensitive to the needs of people and various things, I think, that would characterize a movement person, someone involved in a moment for social change, and that seemed to be some of the reason that Walker was attracted to Jack; and the completeness of the deception was so overwhelming, that I don't recall there—when Mr. Weatherford said he had been an agent for the South Carolina Law Enforcement Division for a year and a half, I didn't believe it. I had no way to believe it. It was days later, when I was still in jail that it became a little more real, but I still am unable to understand how it was humanly possible to maintain such a complete and total deception for such a long time.

Q. You stated earlier that you testified on your own behalf. Did your lawyer call any other witnesses on your behalf to the stand?

A. I don't recall. I don't—I don't recall much. I mean, that was it. It was a very earth-shaking event that unsettled me greatly.

Q. Did the revelation of Mr. Weatherford's identity have any impact on your ability to be a witness on your own behalf?

A. I'm sure that it did. If I was unsettled, I think that would adversely affect my ability to be a witness.

Q. Following your arrest and your release, did you and Mr. Weatherford do anything together in a political vein?

A. Yes, sir.

Q. Tell me what you might have done together?

A. Well, we continued our activities at the University, around anti-war activities, and most specifically comes to mind the period of time of the Cambodian invasion, which I guess was May of that year, between the arrest in March and trial in July, that May was a rather hectic period of activity for a lot of anti-war activists all over the country. Cambodie had been invaded by Mr. Nixon. There was a widespread response all across the country. Hundreds and hundreds of schools and universities were shut down, as was the University of South Carolina, by vote of the student body, vote of the student government, to—as a response to that, to indicate their displeasure with the way the war was being waged in South Vietnam. And in the University of South Carolina, there was a vote to—what I think referred to as a strike—to strike classes, that the classes would not be attended; that there would be workshop and political discussion groups around the war, around our responsibility as American citizens in ending the war; and I think right during that time was the Kent State—the killings at Kent State, when four students were shot. The National Guard was on the campus at the University of South Carolina. I was involved in a lot of the activities then, as was Jack. I recall Jack being at meetings when there were discussions going on. I recall seeing films of Jack, that were taken by a national network of Jack and Walker leaving the Administration Building at the University of South Carolina and did talk with people that were inside the Administration Building at the University of South Carolina when it was occupied, I think was the expression used, and that Jack was an active participant to destruction that was done inside the building. I did not see that however. I was on the periphery at that time. I had been banned from the campus earlier and was on the periphery, and Jack was still involved more directly, but I recall seeing Jack and relating to him and his concern. It was a very high level of emotions at that time about what was going on in Southeast Asia. People who had a very definite commitment to oppose the war there were very

angered and upset by what was going on, and it was a time of high emotions, and I recall those with Jack.

Q. Do you know what the Venceremos Brigade is?

A. Yes, it's an organization that has arranged, oh, for the past several years trips to Cuba, numbering in the hundreds. The groups that would go down I think would be from one hundred. I think the largest one was several hundred, of people from all across the country and in virtually all walks of life, who had an interest in the Socialist experiment that's taking place ninety miles off our shore. It's a very interesting thing going on down there, and for people who want to see social change in this country, there's kind of a laboratory ninety miles off our shore, for social change, and for people that were interested in that, the Venceremos Brigade was a vehicle for them to go down and to learn.

The COURT: How do you spell that brigade?

The WITNESS: V-e-n-c-e-r-e-m-o-s. Venceremos. It means, "We will win," in Spanish.

Q. What would these people who were recruited for the Venceremos Brigade be expected to do if they went to Cuba?

A. Well, different brigades did different things. I have friends that went on different brigades. One brigade worked in the cane—

The COURT: Are we going to bring Weatherford into the brigade?

The WITNESS: Yes, sir, he—

The COURT: Oh. I didn't see where it was relevant.

The WITNESS: Well, different brigades did different things. One brigade worked in citrus fields; one brigade worked on construction of new housing. Overall, the idea of going to Cuba was an opportunity for people to meet other people who were similarly motivated and there were people there from all over the world.

Mr. COLEMAN: Your Honor, I hate to interrupt, but I believe there might be a misunderstanding. Your question to the witness was, "Are we going to bring Weatherford into the Venceremos Brigade?"

The COURT: Well, or connected with the movement. He doesn't have to go to Cuba. I just wondered if he was going to connect this testimony up. That's all.

Mr. MCDONALD: He never was a member, Your Honor, as I understand it, but he made application.

The COURT: I was just trying to find out if it was relevant, Mr. Coleman. That's all.

Mr. COLEMAN: Yes, sir. I was—

The COURT: Not whether he was a member or went to Cuba. Go ahead.

Q. Mr. Bursey, do you know whether or not Mr. Weatherford ever made application for membership in the Venceremos Brigade?

A. Yes, sir, he did.

Q. Would you tell me how you know that and—well, tell me how you know that?

A. At that time, the coordinators in the South of the Venceremos Brigade were two friends of mine in Atlanta. Jack—I don't recall exactly how his interest in the Venceremos Brigade arose, but Jack was interested in going. I know that I was also interested in going, as I had been for a period of time, but because of my legal problems, I wasn't considered a valid candidate. They didn't want anybody to go that had pressing legal problems. They felt that that might cause complications for the brigade. And so, I wasn't considering myself as a candidate, but Jack was; and I recall arranging a meeting with Jack for Jack, in Atlanta, with the organizers of the brigade.

Q. What was the date of that meeting which you arranged?

A. I have no—it was in the summer. It was hot weather.

Q. It was prior to the trial?

A. It was certainly prior to the trial. At that time, Mr. Weatherford revealed his employment with SLED and I don't think would have been a likely candidate for the brigade.

Q. That would have been after your arrest?

A. Yes.

Q. Do you know whether or not Mr. Weatherford kept that appointment?

A. Yes, sir, I carried Jack to the airport here in Columbia; he flew to Atlanta; my wife happened to be in Atlanta at the time, and she picked him up at the airport and carried him to our friends in Atlanta who were doing the interviewing for the brigade; and my wife sat in on the interview, which lasted for about three hours, I believe, and the applications for the brigade had been at that point cut off. They said they were accepting no more, but the brigade had tried to send a balanced group in that they tried to send people from the South; people from the West Coast and the North; black people and white people; and they were receptive to taking another person from the South; and I had known some of the people who were involved in the Venceremos Brigade for a long time and expressed to them my feelings that Jack would be a very worthy candidate to consider, because it was a rare opportunity to go and to see things that we in this country were discussing just on rhetorical levels, seeing people actually trying to implement them and the problems they were encountering, and it was a great learning experience for people to go and—

The COURT: He was under indictment and you were under indictment. How could he qualify and you not qualify?

The WITNESS: I don't recall that. I was also at that time under indictment for a felony in Lexington County, which has since been dismissed, and so I had other legal problems, and I think that—I don't recall now, but I'm sure that that was a consideration.

Q. Do you know whether or not he was accepted in the Venceremos Brigade?

A. Yes, he was. They did accept him and he didn't go.

Q. Did he tell you that he was accepted?

A. I don't recall whether he told me or I was told by the people in Atlanta, but I did learn that Jack could have gone to Cuba.

Q. Do you know whether or not he went?

A. No, he did not go. He testified at my trial.

Q. Mr. Bursey, you have talked about your legal difficulties. Do you have a criminal record?

A. My only conviction is for the misdemeanor, as a result of damage to the Draft Board.

Q. And this was as a result of the trial that took place on January 27, 1969?

A. Yes, sir.

Q. You just mentioned some charges—did you say in Kentucky?

A. Lexington, South Carolina.

Q. Tell me what that was about.

The COURT: He said they had been dropped.

Q. All right. Let's don't go into that. Were you involved in any other charges which you might have been convicted on but later had the conviction reversed? Do you have any other outstanding convictions other than this one which took place on—

A. This is the only conviction I have. I did, I think, make a *nollo contendere* plea to trespassing and disorderly conduct once.

Q. Where was that?

A. In Lexington County.

Q. Now, tell me what happened after your trial? What happened after sentence was passed?

A. Well, after the sentence was passed, I was chained and taken to the Richland County Sheriff's office. That was the last time I saw Mr. Weatherford before today and was —my bond, to my knowledge, had been posted, and it was my understanding that my bond would be carried over for my appeal, and there were some problems on my bond. There were conditions raised that I had to agree to, and they were added onto the bond, and the bondsman was consistently unavailable, and it resulted in my being detained for—I think about nine days. I was held in the Richland County Jail in the drunk tank for three days and then transported to the South Carolina Department of Corrections to the State Prison, for—apparently to begin serving my sentence. My head was shaved, and I was given a uniform and shots within three days after the conviction.

Mr. COLEMAN: Your Honor, we realize we don't have a jury, but this would have nothing to do with the actions of the defendant.

The COURT: It may be the result of the actions of the defendant. I think it's competent. Go ahead.

Q. Go ahead.

A. I spent three days in what they call the drunk tank. There's no bed or anything, and it was most unpleasant, with the idea that I was going to be released on bond immediately; and then the morning of the third day, they came to get me; and I thought I was getting out, and they laughed and chained me again, my hands cuffed and a chain around my waist and shackles on my feet, and transported me to the Reception and Evaluation Center, Department of Corrections, where I was given a prison number, 63,417, and given shots and my head was shaved, and was held for several days before the bond was gotten straight, and I was released on bond, pending my appeal.

Q. What happened to your case after that?

A. Well, I didn't have any legal insight into the possibility of winning an appeal on some grounds such as we are discussing today. I assumed and I was counseled that it was—they got me, and there was very little basis for appeal, and that I had already gone on the stand and acknowledged that which I had been convicted for. I was advised, and there seemed to be no point in pursuing the appeal or very little, let's say. Between the time of my getting out of prison and the time of my appeal being forfeited, or however that's expressed—we didn't perfect the appeal. Between that time, I had been receiving input from various people: one friend that I had that was an employee of the Department of Corrections told me that it would be suicidal for me to submit myself to the custody of the South Carolina Department of Corrections, in that he had personally been told by guards there at the Department of Corrections that they would kill me or that I would be killed, were I to submit myself to custody. I had that to consider.

Q. Did you believe that?

A. I had reason to believe that, yes, sir. At that time, I guess—and most times in history, when someone takes a principle stand for something they believe in, there are going to be people who disagree with them as emphatically, perhaps, as they embrace the principles they are standing up for, and I had been—in Columbia, I had been shot at, I had been beaten up. As I said, the only thing I have ever been convicted of in South Carolina and the only conviction that stands, let's say, is a misdemeanor for malicious mischief, and I think that the wrath of a certain portion of the citizenry here in South Carolina was incurred by my stands against racism and against the war in Vietnam, and my vocal stand on those issues and related issues, and I felt my life to be in danger.

Q. What did you do as a result of what you describe as your fears?

A. I fled.

Q. Where did you go?

A. Oh, we stayed in the country—I think it was almost a period of a year between the time—I think it was January 8 my appeal was supposed to have been submitted, and I was *incognito* for a period of about a year before I was captured.

Q. Just briefly, what were the circumstances of your capture?

A. Well, I had developed an interest that I had had all along—an interest I still have—in herbal medicines and peyote cactus and native American religion and had met an individual in the Northeast that had met an Indian Mescalero Apache in south Texas, where he had gotten this peyote cactus from, and peyote cactus is a cactus plant that's indigenous to the desert areas of this country, and it has rather peculiar properties that have been used for thousands of years in religious ceremonies by Indians and other tribes of people: the Incas, the Mayas and the Sioux and all. There's a great deal of religious history around the use of the peyote cactus, and I view the carefully considered application of the peyote cactus to be a tool for spiritual therapeutics, and I have quite firm convictions and feelings about it. Anyway, I had some peyote cactus

and was stopped by Federal officers who informed me that six weeks prior to that date, the possession of peyote cactus had become a felony and was arrested.

Q. And were you acquitted? Were you ever charged?

A. Yes, sir, I was charged with a felony; possession, I believe, with intent to distribute was the charge; was convicted, and the sentence was subsequently overturned by the Fifth Circuit Court of Appeals.

Q. Are the charges going to be retried?

A. No, sir, they have been completely dismissed.

Q. Do you have a—were you formally notified to that effect?

A. Yes.

Q. All right, what happened then after your arrest?

A. Oh, Mr. McDonald, I would like to add for the benefit of those who don't know that the possession of this peyote cactus is perfectly legal for about a quarter of a million people in this country; and, so, it's a law that's applied to specific people.

Q. Now, as a result of your being arrested in connection with those charges, I believe you said that you were brought back to South Carolina?

A. No, not at that time. I was—I posted bond again at that time and applied to the Court for permission to travel, which was granted. My lawyer advised me that I wouldn't have trouble travelling. I came home to visit my parents, whom I hadn't seen in a long time, my grandparents and so on, and was on my way back to Texas, travelling through the Midwest, when I was stopped in Lincoln, Nebraska, for a routine traffic check, was the way the officer put it, driving my own vehicle, using my own driver's license, with the understanding that I had—that the permission the Court had given me to travel would have made it legitimate for me to do so; and was—oh, about three days after being stopped for this routine traffic inspection, was arrested by the Lincoln, Nebraska, City Police Force on the weight of a warrant from South Carolina. And I denied being who they were looking for and tried to argue—initially denying it, because I wanted to—

I had bond posted, and this seemed to be a complete, unwarranted intervention of the legal process, and I was still honoring the bonds that were posted in Texas, and we were going—we were proceeding with the cases, and we wanted to do it on that basis, on our time; and I didn't want that to happen, as it happened in Lincoln, but ultimately, I was extradited from Nebraska.

Q. All right. To South Carolina?

A. To South Carolina.

Q. What happened to you after you got back to South Carolina?

A. I was held in the County Jail for a period of time and transferred to the Reception and Evaluation Center, the Department of Corrections, and then I was sent to the Central Correctional Institute, at the State Prison, on Gist Street, and began serving my sentence.

Q. And did you serve your sentence?

A. Yes, sir.

Q. How long did you serve?

A. A year and a half.

Q. That's eighteen months?

A. Well, I served—altogether, I served a year and a half. I served a year straight with the Department of Corrections. There were more months there that I served, but it was—the period of time from—I think from one October to another October was a straight service of a year.

Q. When you say you served a year and a half, are you adding onto the time you spent—

A. Various times that I was held in other jails and all, arising out of this incident.

Q. Were you paroled?

A. No, sir, I served my sentence.

Q. Were you ever considered for parole?

A. No, sir, with a sentence that short, you don't come up for parole, eighteen months.

Q. All right, sir.

THE COURT: Not if you have skipped the State.

Q. Some of this year and a half period was spent immediately after your conviction?

A. Some of it, yes, sir.

Q. And you also include in that the time you spent after your arrest, the twelve days you spoke about?

A. Yes, sir.

Q. Now, during the period of time that you were arrested, can you tell me approximately what your weekly income was?

A. During the time of the arrest?

Q. If you had an income? Right?

A. Well, I was being a student then, so I was not employed.

Q. What about after you—prior to your trial, you were a student during that entire time and had no income?

A. Yes, sir.

Q. Now, did you ever have an opportunity after—at any point after your arrest to take a job following your graduation or following your leaving the University of South Carolina?

A. Yes, sir. I didn't graduate, but I had a good job offer with the Atlanta Office of Economic Opportunity. Prior to the trial, I was offered a job of running a community center in a suburb of Atlanta, which would have been working with under-privileged children and helping them set up a book shop and community center, and it was a very good job; it was supposed to pay fourteen thousand dollars a year, as an OEO project that would have been an on-going project that I would have been working in. I had the job; the trial came up; I was convicted and consequently couldn't take the job.

Q. You had been offered the job prior to your arrest or after the arrest?

A. After the arrest.

Q. Was there some sort of continguency agreement that if you were acquitted, you would get the job; otherwise, you wouldn't? I don't quite understand—or did they know about the charges?

A. They knew about the charges and the contingency was mine. Had I been acquitted, I would have followed through with the acceptance of the job; but once I was convicted, I just informed them I couldn't take it.

Q. What was the duration of the job?

A. There was no time period specified.

Q. It was permanent employment?

A. Yes, sir.

Q. Do you recall the Government rating which you might have had?

A. No, sir.

(The Court announced that a brief recess would be taken.)

(11:25 a. m. recess; resumed at 11:45 a. m.)

Mr. McDONALD: Your Honor, I think in examining Mr. Bursey on one or two occasions or maybe consistently, I said that the arrest and trial were in 1969. They were in 1970.

The COURT: All right. I've got the transcript.

Mr. McDONALD: All right.

Q. Mr. Bursey, in response to an earlier question, you mentioned a conversation which you had with Mr. Weatherford about his meeting with certain law enforcement officers at Hilton Head. Do you recall that testimony?

The COURT: He hasn't mentioned that yet.

A. I do recall recalling an instance when Weatherford told me that he had been approached by law enforcement officers.

The COURT: Right.

Q. I'm sorry. Would you explain to me, tell me what he told you in that conversation?

A. Well, I think it would be best to give some background on the incident. Weatherford was the one that volunteered the information. I had been told by a friend of mine earlier that he had seen a person with long, dark hair in the company of Sonny Clark in Hilton Head, and I never considered that that was Jack. Later—maybe weeks later, days later, Jack told me that he had been with Sonny Clark at the urging of his family friend, Dr. Hardwick. He said that Dr. Hardwick said, "It's the least you can do, Jack, is to go down and talk to them," and Dr. Hardwick arranged a meeting with law enforcement officers, Sonny Clark being one that I was told, with Jack in Hilton Head. Jack

came to me and volunteered this information. He said that "I went to Hilton Head; I met with Sonny Clark; they wanted me to turn State's evidence; they offered me a deal," is what it amounted to, "and I rejected it."

Q. When did you have this conversation with Mr. Weatherford?

A. Well, certainly between the arrest and the time of the trial, in June, perhaps. I don't specifically recall. I remember we were sitting on the front steps of Walker's house, and Jack told me about it and said that he had been approached. I mean, we had previously discussed the possibility and even probability that he may be approached by law enforcement officers with a deal of some sort, discussed the possibility his brother might be mentioned in that deal; and Jack, at this time I am referring to, volunteered the information that at the insistence of Dr. Hardwick, he had met with law enforcement officers in Hilton Head, and they tried to get him to—I don't exactly know what it was—to confess, but to cooperate with them, and Jack assured me —the thing I specifically recall, of course, is his assurance that he would not cooperate with them.

Q. All right. How long did this entire conversation take?

A. I imagine it was a lengthy conversation, because it would have been something that I was quite interested in. This was something that we were anticipating, and I don't recall specifically, but I know it wasn't an off-the-cuff remark. It was an in-depth conversation, and Jack explained it more or less to my satisfaction, that he did it because he felt he had an obligation to Dr. Hardwick to explore all the avenues, in that Dr. Hardwick was putting up his time and money and security on Jack's behalf.

Mr. McDONALD: All right. Thank you, Mr. Bursey. Will you answer any questions Mr. Coleman might have?

CROSS EXAMINATION

By Mr. COLEMAN:

Q. Mr. Bursey, with reference to your testimony about the absence from the State of South Carolina—for a period of a year and a half, I believe you said? Is that correct?

A. Well, ultimately, I believe it could have been that long, a year and a half.

Q. Was it that long?

A. Well, I recall leaving South Carolina the first part of 1971, in January, early January, '71, and I was extradited finally in October or November, of 1972, and so, it was almost two years before the extradition.

Q. That was from Nebraska?

A. Yes, sir.

Q. What was your status? You had been convicted in 1970 and sentenced. Were you on appeal bond?

A. In Texas?

Q. No. Were you out of jail, on appeal bond?

A. For what charge?

The COURT: From here, I think you are talking about, aren't you, Mr. Coleman?

Mr. COLEMAN: Beg your pardon?

The COURT: You are talking about the appeal bond here in South Carolina?

Mr. COLEMAN: Appeal bond in South Carolina.

Q. You had been convicted here in South Carolina, had you not?

A. Yes, sir.

Q. You had been sentenced?

A. Yes, sir.

Q. You had not served the sentence?

A. No, sir.

Q. Why were you out of jail? How were you out of jail?

A. I had posted an appeal bond.

Q. You were on appeal bond?

A. Yes, sir.

Q. And you left South Carolina with your wife, I believe?

A. Yes, sir.

Q. And were gone for a period of two years?

A. Yes.

Q. And did I understand you to say you had no idea there was anything wrong with that absence from the State?

A. Oh, no, sir, I certainly didn't say that. I was well aware of the fact that I was supposed to go to prison. That was the reason I left, was because I had what I feel at the time—and in retrospect, perhaps it was warranted, because those were times of high emotion, I think, for myself as for the community, about Vietnam and other aspects that arose at that time that were discussed. It was a high emotion, and I felt that it would be dangerous for me to submit myself to the custody of the Department of Corrections.

Q. Notwithstanding your feelings, you did know that you were a fugitive from justice. Is that right?

A. That's correct.

Q. Now, let's get to the testimony with regard to your activity in and about Corpus Christi, Texas. Was your interest in the substance peyote entirely academic or exactly what was your interest in that drug?

A. It certainly was entirely academic, because prior to my coming in possession of the substance I was arrested with, I had never seen it.

Q. What did you do with it?

A. I—it was ultimately burned by the Federal authorities in Corpus Christi.

Q. You were arrested with the substance, Mr. Bursey?

A. Yes, sir.

Q. Do you recall the quantity of peyote involved in that arrest?

A. I think that I had—my wife and I had in our trunk about a hundred and eighty something pounds of the cactus plant, which included the entire plants, the roots and all; and there was another individual involved that had another portion about that size.

Q. Might I suggest, Mr. Bursey, that there was involved in the arrest of you and your wife in Corpus Christi

four hundred and ninety-six and a quarter pounds of peyote?

A. Between all the people involved, yes, sir, I think that's right.

Q. And that was intended by you for use experimentally? Is that what I understand you to say?

A. Well, it would be difficult for me to convey my perception of the psychotropic plant peyote to someone who has not researched the historical usage of it and relates to the use of psychotropic drugs in the way that I do. Experimentation would be, I guess, the way we could relate that.

Q. You did know, Mr. Bursey, at that time that peyote was an unlawful drug, did you not?

A. I was under the misconception that possession of peyote was a misdemeanor for those who were not members of the Native American Church, as it was indeed from '68 to September, '71. It was a misdemeanor.

Q. You did know it was unlawful?

A. Yes, sir.

Q. How did you say you happened to be picked up or arrested in Corpus Christi?

A. We have never ascertained that. We were just stopped.

Q. As a matter of fact, Mr. Bursey, weren't you and your wife arrested together?

A. We were in the vehicle together when we were stopped, yes, sir.

Q. Was not the vehicle in the vincinity of the back of a drug store?

A. No, sir.

Q. It wasn't?

A. No, sir.

Q. You were not accused of casing the drug store at the time?

A. We were stopped in a county in Texas that's called Kennedy County that's a very large county, and I think the population is probably smaller than the number of people in this room, and we were stopped at what was referred to as a mobile checkpoint that's manned by the Bureau of Immigration, which is a Department of Justice authority,

I believe; and it was on a very long stretch of road, and there was a little van on the side of the road, and they stopped us and asked us to open our trunk.

Q. Mr. Bursey, does the name Richard Joseph Lilandi mean anything to you?

A. Yes, sir.

Q. What meaning does it have to you?

A. That is the pseudonym that I used when I was arrested in Lincoln, Nebraska.

Q. In other words, you were posing after you left South Carolina, part of the time as Richard Joseph Lilandi?

A. No, sir, I was using the identification of Brett Bursey; was driving the vehicle known by authorities to be owned by Brett Bursey, with the understanding, as pursuant to a Court order that was issued in Texas—not Court order, but permission by the Court, giving me permission to travel, that I, as Brett Bursey, could walk the streets and not think I was doing anything wrong; and when I was stopped in Lincoln, Nebraska, by the police, who said that they had a warrant from South Carolina for Brett Bursey, the first thing that I thought was that I wasn't ready to go back. I had—my defense wasn't in order; and the police officer walked up and said, "Are you Brett Bursey?" And I said, "No, I'm not." I wasn't pretending to be someone else prior to being confronted by that circumstance.

Q. And is that the time that you gave your identity as Richard Joseph Lilandi?

A. Yes, sir.

Q. You did refuse to waive extradition back to South Carolina?

A. I ultimately waived extradition.

Q. You did at first refuse?

A. Yes, sir, I did at first refuse.

Q. Later, certain SLED agents from South Carolina went to Lincoln, Nebraska, and got you and brought you back? Is that not correct?

A. Yes, sir.

Q. After which you then served your sentence here?

A. Yes, sir.

Q. Mr. Bursey, getting to your testimony with reference to what occurred prior to the Selective Service office incident—is that phraseology acceptable to you?

A. Yes, sir. That's fine.

Q. You are not saying by your testimony that Mr. Jack Weatherford, one of the defendants in this case, initiated the idea of the incident at the Selective Service Board, are you?

A. I don't recall saying any specific individual—

Q. I'm asking you.

A. I don't believe I said that, no, sir.

Q. You don't claim that?

A. I do not claim that Jack Weatherford initiated or instigated—how did you put it? It wasn't his idea, no, sir.

Q. Whose idea was it?

A. I can't specifically recall whose idea it was. We knew as a group—AWARE was aware of the fact that that period of time was National Anti-Draft Week. There was general discussion about doing something in regard to that locally. A number of ideas were brought up for things to do by a number of people. I don't recall anyone specific. My idea had been for a theatre activity in the daytime at the office of the Selective Service System. That's what I remember being my own idea. Ultimately, it evolved into what the record reflects.

Q. Was not the idea of doing what was ultimately done initially your idea?

A. I don't recall that.

Q. You don't recall it or you do not deny it?

A. Oh, I would deny that it was my idea. What I do recall is my idea, and my idea was for a theatre action.

Q. You referred, I believe, to the incident at the Selective Service office, in Columbia, as a symbolic demonstration. What did you mean Columbia, as a sympolic demonstration. What did you mean by "symbolic"?

A. Well, I believe that the note that went through the window of the Draft Board said that no amount of damage that we could do here would be commensurate to the death and destruction wielded by the Selective Service System, and in that respect, any damage that we did was symbolic. It was to convey—perhaps misguided frustrations—I don't know—history will probably be the judge of that—but to convey the feelings of certain South Carolinians that what was going on in Vietnam at that time was so wrong and so pressing that we reach to it, that we resorted to something that was illegal a symbolic gesture to our opposition to the war.

Q. There was actual damage done?

A. Yes, sir.

Q. Extensive damage?

A. I don't believe it was extensive. I was there when it happened, and it certainly didn't—we had no idea that we were doing extensive damage. There were several slogans spray-painted on the wall; one window broken; and a quart bottle of red paint thrown through it. I don't believe that's extensive.

Q. Wasn't there testimony at the trial that the damage was in the neighborhood of fifteen hundred dollars?

A. I believe that estimate was raised.

Q. *In toto,* Mr. Bursey, was not the association of Jack M. Weatherford with you in this particular incident and the activity leading up to the selective office incident merely to go along with you, rather than being a leader?

A. Jack was in a position of leadership, a *de facto* as well as *de jure* position of leadership, in his holding office in the organization of AWARE. Now, his actual personal involvement was something that—like I said, I don't recall Mr. Weatherford ever formulating any new ideas; "This is a new idea; let's do this," but I do recall Jack talking about involving himself in discussions. He wasn't totally passive. He was a friend and confident. I confided in him and trusted him, because he gave me some basis to do that, and in retrospect, I believe that basis was in expressing feelings that were similar to mine.

Q. Now, the incident occurred; you were arrested. I believe you said a Mr. Gasque was involved in the arrest. Are you sure of that?

A. The man that I recognize from SLED as Gasque, I thought was there. I certainly may be mistaken, because I don't know the man other than seeing him once or twice. If he's in this room, it's not him.

Q. Do you see this gentleman here?

(Gentleman stands.)

A. Yes, sir.

Q. He is the one who participated in the arrest, did he not?

A. I believe he was there. I wasn't sure if he was there or not. I recall there being a large, older man from SLED that was there, and I think it was Gasque.

Q. Could it have been Mr. Windham?

A. I don't know.

Q. As I recall your testimony and made a note thereof, it was approximately twelve days after your release on bond, following your arrest for the Draft Board incident that you first met with Jack Weatherford after the incident?

A. Are you saying approximately twelve days?

Q. Yes.

A. I would say approximately twelve days. It was right after I got out.

Q. Where was that meeting?

A. Well, the meeting that I recall with Jack was at Barbara Herbert's house, a woman who was living—I believe it's Heidt Street, in Columbia.

Q. Is that the same Barbara Herbert who was involved in the demonstrations at the University from time to time?

A. Yes, sir.

Q. What was the occasion for your meeting there? Who initiated the meeting?

A. Well, after I got out, I mean, I was, of course, releaved to be out and wanted to go see my friends and went to Barbara's house and Jack was there, is the way I recall it. He was there, and we embraced and exchanged feelings of relief that I was out and that he was out and proceeded to discuss matters at hand, being the defense of the case.

Q. All right. We'll get to that. At any rate, this was not an arranged meeting to discuss your case?

A. Not the initial meeting, no, sir.

Q. You casually or at least with no particular plan in mind visited Barbara Herbert's house?

A. Yes. I don't even reckon that I knew when I was getting out, so what happened, as soon as I got out, I went there.

Q. So, it happened that Jack Weatherford was present?

A. Yes.

Q. Do you recall the extent of your conversation about the Draft Board incident and the facts involved therein?

A. In this first casual meeting?

Q. Yes.

A. I can make suppositions, what we must have discussed, but I don't recall specifically.

Q. No, sir, I don't want any supposition. What you know, if you remember anything. Do you?

A. Well, like I say, I remember embracing Jack. I do recall postulating even at that time that there was perhaps an agent involved, because of the way the arrest happened, immediately after the incident.

Q. At that meeting, still talking about the first meeting at Barbara Herbert's house, did Jack Weatherford try to draw you out by questioning in any way what your defense would be?

A. I don't recall.

Q. In fact, Mr. Bursey, this was a most casual meeting, was it not?

A. In the sense that it was not planned by either one of us, it was casual. My first meeting with Jack, when I was getting out at an unspecified time—if I didn't know when I was getting out, I could not set up a meeting with him, but I would have been indeed looking forward to seeing someone who was my co-defendant and did apparently share his relief in seeing him.

Q. How long did Jack remain at Barbara Herbert's house on that particular occasion after your arrival?

A. I don't recall. I simply don't recall.

Q. Was Mr. Wise present at that meeting?

A. Not at that meeting, no, sir.

Q. Was any discussion had between you and Jack Weatherford at that first meeting at Barbara Herbert's house with reference to representation of either of you by an attorney?

A. I'm not sure that I had retained Mr. Wise at that point. I'm not sure that Jack told me at that point that Mr. Taylor was his—was representing him. I don't recall, as I said, the specifics of that conversation, other than the relief that we both shared, being out of jail.

Q. As I recall it, your testimony indicated that there were only what you termed formal meetings.

R. Meetings in the sense that I recall very specific instances that I could swear to, when Mr. Wise, Mr. Weatherford and myself were present and we did discuss defense plans.

Q. I have a note here that you testified that the meeting at Barbara Herbert's house was one of these formal meetings.

A. I don't believe I said that. If I did, I think I was in error. I said that I believed the first meeting, the one that took place when I introduced Mr. Wise to Mr. Weatherford was at a house I was renting in the country, outside of Columbia; and the second one that we are referring to as a formal meeting was at Walker's house; and I believe that's what I said. If I didn't, I'm in error.

Q. Did you thereafter see Jack Weatherford in connection with social occasions?

A. Yes, sir.

Q. Those are not what you term formal meetings? Is that correct?

A. Well, I wouldn't ever consider any of my meetings with Jack formal. I was using the distinguishing term "formal" to specify the times that Mr. Wise, as my retained attorney, whom I was paying to do defense work for me, made specific trips to discuss the case with me and Mr. Weatherford.

The COURT: What you are saying, they were pre-arranged meetings, rather than formal meetings?

The WITNESS: Yes, sir.

Q. Was not Mr. Wise your personal friend also, as well as your attorney?

A. I had not met Mr. Wise prior to retaining him as my counsel.

Q. I believe his practice is in Greenwood. How did you get in touch with him?

A. A friend of ours, mutual friend of ours, advised—after I got out of jail, we were discussing who I should seek as counsel, and Mr. Wise was brought up, and I called him, I believe, the evening of the first day I was out of jail; and Mr. Wise said he would consider it, and I should come to Greenwood and talk to him about it, and I did, and he subsequently took the case.

Q. After your employment of Mr. Wise as your counsel, what was the first formal or pre-arranged—whichever term you prefer—meeting in which Jack Weatherford was involved with Mr. Wise and you?

A. That was the one that I referred to that took place at my house, off the Leesburg Highway, in the country.

Q. How did Jack Weatherford happen to be there?

A. I asked him to come.

Q. Did you tell him that Mr. Wise was to be there?

A. That was the purpose of the meeting.

Q. I asked you did you tell him that Mr. Wise would be there?

A. Yes, sir.

Q. Did Mr. Wise know that Mr. Weatherford would be there?

A. Yes, sir.

Q. Who else was at this meeting in the country?

A. I don't recall anyone else being there.

Q. This was a meeting simply for the purpose of discussing the case and nothing else?

A. Yes, sir.

Q. What was the principal things discussed? What were the facts discussed between you, Mr. Wise and Mr. Weatherford?

A. Well, it was the first meeting between my defense attorney and my co-defendant and myself, and we went

over every aspect of the case that any of us could recollect, and I recall the specific topic of conversation being the possibility of there being an agent involved.

Q. In fact, wasn't the possibility or suspicion—whatever you might call it—that an undercover agent might have been involved—wasn't that the principal subject of this conversation?

A. It was one of the principal subjects.

Q. What were some of the others?

A. The actual incident itself, the details of it taking place. I assume that we just discussed—I mean, I know that we just discussed every aspect of the case that came to mind, generally discussing it, talked about—I recall talking—at this time, now, Jack had Mr. Taylor as counsel. Jack had informed us that Mr. Taylor suggested that we be tried separately, so we knew that we were—though we were charged with the same crime, we wouldn't be going on together. We agreed with Jack that was probably a good idea. We weren't surprised by that.

Q. Jack didn't—Mr. Weatherford, then, did not mislead you with reference to his desire or the desire of his lawyer for him to be tried separately from you?

A. No.

Q. This was no surprise to you?

A. No.

Q. What exactly, Mr. Bursey, was Mr. Weatherford's role in that conversation?

A. He answered questions put to him by Mr. Wise.

Q. What questions?

A. Questions about the incident.

Q. What precise questions, if you remember?

A. What he did at the scene. He acknowledged taking part in the incident; he acknowledged spray-painting a peace slogan on the wall. I think he mentioned that he threw a brick at the window, but it didn't go through. I do recall Jack agreeing, concurring in discussion around the idea that Mr. Merrick, the third party that was present at the Draft Board, was the agent, could be the agent. I recall specifically Mr. Weatherford agreeing and discussing that point with us.

Q. Other than the actual facts of the occurrence at the Draft Board office and the possibility of there being an undercover agent involved, what else did Mr. Weatherford say?

A. About Mr. Taylor being his lawyer?

Q. Or anything else?

A. About Mr. Hardwick—Dr. Hardwick, I believe it is—his family friend being responsible for his bond; Mr. Hardwick being responsible for Mr. Taylor being his attorney; about Mr. Weatherford's concern that this instance was going to affect his brother adversely, his brother who was in prison at the time. Other than relating the specifics of the instance and talking about Mr. Taylor, postulating the presence of an agent, I don't recall any specifics.

Q. In your opinion, Mr. Bursey, did anything that Jack Weatherford said or did on that occasion have any effect or purpose other than to maintain the disclosure of his identity as an undercover agent?

A. In retrospect, I certainly see that Jack was, you know, was misleading—sending us off on the wrong track in thinking that someone else was an agent. As we planned our strategy around the idea that Mr. Merrick was an agent and Mr. Merrick wasn't in the country, then there was nobody there that could place us at the scene of the crime. Mr. Weatherford was aware of that, and so Mr. Weatherford—we did—it was openly discussed that Mr. Weatherford was the—would be indeed in my case the key witness; that if Mr. Merrick was not available, his testimony would be necessary or it would be most damaging anyway.

Q. Of course, Mr. Bursey, that's factually obvious, but you initiated the meeting, at least as far as Mr. Weatherford is concerned, by asking that he be present? Is that not correct?

A. Yes, sir. That's correct.

Q. He did not seek out this meeting? He did not ask to see you?

A. I do not recall that.

Q. You had been very close to Jack Weatherford? You were still, as far as you knew, very close to him? You were

a co-defendant in this criminal action. Now, had Mr. Weatherford refused your invitation, would not that have made you very suspicious of Mr. Weatherford and his relationship to you?

A. I would have questioned Mr. Weatherford's reasoning for that, but I don't know that that would have made me think he was an agent. I think that if Jack had said, "No, I don't want—I want to separate myself from you. I don't want to become involved in your defense or anything. I'm going to—my defense is going to be that you led me into this," or something, that would have been—I could have understood that. Just a flat rejection of it, I don't think I could have, but he never expressed any reluctance to confer with myself and my attorney.

Q. Well, knowing the circumstances, the facts and the relationship between you two, do you know of anything else that Mr. Weatherford could have done and maintained his cover, so to speak, than that which he did on that occasion?

A. He could have been unavailable. I assume that that would have ultimately come to a head, if he was consistently unavailable when I wanted him to talk to my attorney. Now that you mention it, I in rertospect have wondered why it was necessary for Mr Weatherford to maintain his "cover," as you said, after the arrest.

Q. That is not really the question for you to answer or for me.

A. No.

Q. And that is not the question I asked you.

A. Okay.

Q. I asked you can you think of any other thing, any other course of action that Mr. Weatherford could have taken in the circumstances and still maintained his cover, insofar as you are concerned?

A. Yes.

Q. What?

A. He could specifically for this instance simply said he was unavailable.

Q. That would not have aroused your suspicious?

A. No, if Jack said he had a prior commitment on this—whatever—I think it might have been a Saturday or a weekend—if he said, "No, I've got to go somewhere else," I wouldn't have had reason to be suspicious. I was not suspicions of Jack Weatherford.

Q. But had he done that, would you not have immediately set another date or at least contemplated that?

A. Yes, I would have.

Q. Mr. Weatherford would have been in no different position that he was initially?

A. But referring to this specific instance, as you just said, what could he have done in this specific instance? That's what he could have done. That would have, of course, you know, necessitated other instances arising that he would have had to deal with, so it would be a chain of events that ultimately he would have been caught up in; but you asked if he could have avoided this meeting, and "Yes," he could have.

Q. All right, let's get to the next pre-arranged or formal meeting that you had with Mr. Weatherford and, I believe, your attorney Mr. Wise, which I believe you said was approximately a week prior to trial. Where did that meeting take place?

A. At Miss Maybank's house.

Q. Where is that? Where was that?

A. I don't recall the street that it's on. It's on a street that's parallel with Divine Street, about two or three blocks in on the same side of the street that—well, there's a playground back there. I know where it is but—

Q. In the City of Columbia?

A. Yes, sir.

Q. Vicinity of the University?

A. Well—

Q. I'm not concerned with the exact address.

A. Divine Street, down towards Fort Jackson.

Q. All right, who initiated that meeting? Anyone?

A. I do not recall that meeting being planned. I assume it was, because Mr. Wise came into town. It was prior to the trial, and we wanted to discuss matters with myself

and Mr. Weatherford, but I don't recall making plans for it. I can't specifically—

Q. It was an unplanned meeting, so far as you know?

A. It was indeed a planned meeting. I don't recall making the plans. I know that Mr. Wise travelled for the purpose of discussing the case with myself and Mr. Weatherford. I don't recall the instance that I called Mr. Wise and said, "Come to Columbia and meet with us"; but if anyone planned it, inviting Mr. Wise to Columbia—he might have said, "I need to talk to you and Jack one more time," and I might have said, "Why don't you come down Saturday," something like that.

Q. Did you say any of those things?

A. Sir?

Q. Or might have said them?

A. Sir?

Q. Did you say those things? Did you call Mr. Wise? Did you pre-arrange the meeting or not?

A. I am assuming that Mr. Wise's presence indicated that he was invited, and that it was arranged. I do not recall specifically doing it, no, sir.

Q. Insofar as you know, it was not a pre-arranged meeitng? Is that not correct?

A. Well, I don't think that's exactly the point I'm trying to express. It was a pre-arranged meeting—

Q. I'm quite sure it's not, but I'm asking you a factual question, and I would like a straight answer.

A. Yes, sir. Well, the best I can say it was a prearranged meeting. I do not know who made the arrangements.

Q. What indication is there that it was pre-ararnged if you do not know who made the appointment? Who told you about the meeting?

The COURT: I think the question answers itself. The lawyer is not coming down from Greenwood just to twiddle thumbs. He wants to meet his client.

Q. Do you know how Mr. Weatherford obtained the information that a meeting was to take place?

A. It took place at his house.

Q. And do you know that he knew that there was a meeting to take place?

A. I assumed that if it took place at his house, he knew. I do not recall specifics. It's been four years.

Q. Did he say he planned the meeting?

A. Did Mr. Weatherford say he planned the meeting?

Q. Yes.

A. I do not recall Mr. Weatherford saying.

Q. Then, insofar as you know, this was a casual meeting between you, your lawyer and Mr. Weatherford, that happened to take place at Mr. Weatherford's house?

A. To the best of my recollection, it was not casual in the sense that it was pre-arranged.

Q. Was any sort of social occasion connected with the meeting?

A. No, sir.

Q. What was said at that meeting?

A. Well, that meeting—at that meeting, we had a date for the trial, so we knew we were proceeding. At that meeting, we further discussed our feelings as to who an agent was, what that agent's impact on our plans and tactics and strategies would be. I think we summed up the essence of the defense in the sense of saying that "If Mr. Merrick is an agent and he is not going to be in town, then Jack if—we don't want you there." I remember very specifically Rauch—Mr. Wise—telling Mr. Weatherford, "Do not be in Court that day." You know, "Don't come as a spectator, because we don't want you to be called by the prosecutor," and Jack assured us that he would not be present. Other than Jack's testimony, we were basing our defense strategy on the fact that we knew that Mr. Merrick was unavailable; that if Mr. Weatherford was unavailable, then that was the basis that we were proceeding on, that they had no one that could place me at the Draft Board.

Q. Mr. Bursey, when you speak of defense strategy in this instance you just spoke of, aren't you speaking solely of the fact that you did not think that the State had evidence to prove the case against you?

A. Well, I think that strategy would encompass that, yes, sir.

Q. Isn't that the sole subject of the conversation?

A. That the State did not have evidence to convict me?

Q. Without Mr. Weatherford's testimony?

A. Without Mr. Weatherford's testimony. That would be one of the cruxes of it, yes, sir.

Q. It would be *the* crux of it, would it not?

A. Well, I'll have to think on that. Yes, sir, I believe it would be. I do recall at that meeting also there telling—telling Mr. Weatherford that there had already been statements by other people involved, Mr. Finney and Mr. Bolding, and that if Jack wanted to, if he could get a deal and clear himself or help his brother, I recall telling him that in light of these statements, if he could cooperate with the State, kind of in keeping with those statements, that he should go ahead and clear himself if he could. I was giving on that point. I mean, I equivocated in the sense of telling Mr. Weatherford. I didn't say, "Jack, don't you dare cooperate with the prosecution." I said, "If you think you can get off, you know, it's your decision; but, you know, in view of the fact that the prosecution already has some statements, if you could keep your statements in line with those in good conscience, then go ahead and do it." But Jack volunteered the information that he would not in any way cooperate with the prosecution.

Q. Again, Mr. Bursey, did Mr. Weatherford do anything at that meeting, beyond maintaining or attempting to maintain his cover or to prevent the disclosure of his identity as an undercover agent?

A. I think that his sharing our supposition that Mr. Merrick was an agent in retrospect was misleading, unless of course, Mr. Weatherford knows Mr. Merrick was an agent. He may well have been an agent for SLED or some other law enforcement agency, but to my knowledge, he is not. I don't know, but Mr. Weatherford did openly postulate, "Yeah, Greg Merrick could be the agent." I don't think it was necessary for Mr. Weatherford, to maintain his cover, for him to urge me to flee. I think in retrospect it seems that he was probably protecting not his cover but his own personal involvement and the trauma that would result from him having to expose himself as an undercover

agent. If I had fled and had never been captured and had never gone through the trial, I guess he never would have had to go through the trauma of exposing himself as an undercover agent.

Q. Mr. Bursey, with reference to your allegation that Mr. Weatherford tried to prevail upon you to flee, do you mean by that leave the country or what? Do you know?

A. Yes, leave the country, leave the State, make—in essence, make myself unavailable for prosecution.

Q. May I suggest, Mr. Bursey, that Mr. Weatherford, instead of attempting to get you to flee or get out of the country where you could not be tried, attempted to prevail upon you to get psychiatric care and go in a hospital?

A. That has been mentioned, and I have some vague recollection of that being mentioned, but I don't recall that it was ever more than tongue-in-cheek or done with the idea that "Well, if you commit yourself to the State Mental Hospital, maybe that will give you an out. That you are not really a criminal; you are just crazy." But I never considered that, and I certainly don't recall Jack ever suggesting it, and I have a vague recollection of that being an idea that was proposed at one time, but I don't recall Jack proposing it.

Q. Do you know who proposed it?

A. I do not.

Q. Are you absolutely certain it was not Jack?

A. I'm not absolutely certain in that I don't recall who did it, no, sir; but I do—in reference to the first part of your question, I do recall specifically Jack recommending that I split, I think was the term that was used.

Q. Did he say why he wanted you to split?

A. So I wouldn't have to go to prison, was the express purpose. I don't recall—Jack certainly didn't say, "I want you to split so you won't blow my cover." If your co-defendant urges you to flee, it's because he's concerned about you, I assume. I don't recall the specifics of that.

Q. Now, Mr. Bursey, with reference to the Hilton Head incident, is it true you received information from someone, at least a report from someone, that someone resembling

Jack Weatherford had been seen at Hilton Head Island with a police agent or police officer?

A. The report that I received was from a fellow named Mike Etu that I knew socially from the University. He was not a member of AWARE. He did not attend our meetings. He was a graduate student. He was involved in doing work with the Student Union there. I had occasion to see him in his capacity, working with the Student Union, and we were friends. We spoke and got along well. And Mr. Etu told me that he saw a long-haired person in the company of Sonny Clark. He knew Sonny Clark, recognized him visually. He said he was walking at Hilton Head when he saw this long-haired person step into the bushes as he passed Mr. Clark, and he did not—Mr. Etu did not know Jack Weatherford; so it was not—he was not able to say that he looked like Jack Weatherford. I heard that a person with long, dark hair was seen at Hilton Head, talking with Sonny Clark.

Q. Did you suspect at that time that it might possibly be Jack Weatherford?

A. No, sir.

Q. After Jack returned to Columbia from Hilton Head, shortly thereafter, did you not send him word you wanted to talk to him?

A. I don't recall ever—like sending word that I wanted audience with Jack. I would either go see him or call him up or say, "Can I come over?" Phrasing it like that, doesn't seem to be in context with our relationship.

Q. You did, however see Jack—

A. I did.

Q. —a day or two after he got back?

A. Yes, sir. I assume it was a day or two after he got back, because he was the one that volunteered the information about the Hilton Head incident, and he was the one that said that it had just occurred.

Q. Doesn't it seem plausible to you that the reason for Mr. Weatherford telling you this was to explain his presence at Hilton Head with—

A. With the—I have read his deposition that was taken in California, and apparently with the idea that the

individual that saw Mr. Clark in Hilton Head possibly knew Mr. Weatherford and knew me. Apparently Mr. Weatherford felt it was incumbent on his undercover identity to explain away his presence in Hilton Head with Sonny Clark.

Q. Then again he was doing nothing more than attempting to maintain his cover? Is that not correct?

A. I assume that was his attempt, yes, sir.

Q. Mr. Bursey, with reference to a man named Finney, do you remember the preliminary hearing that was held before Magistrate Watts in this case?

A. Yes, sir.

Q. In which you were represented by Mr. Wise, I believe?

A. Yes, sir.

Q. And did not Mr. Finney testify at that hearing?

A. I believe Mr. Finney did testify at that hearing, yes, sir.

Q. I believe also, as a matter of fact, Mr. Finney was the one who copied the note that was thrown into the Draft Board office? Is that not correct?

A. Yes, sir, Mr. Finney's statement to SLED in the form of a deposition, I believe, reflects that.

Q. Did he copy it from your note that you had originally written?

A. Yes, sir.

Q. And, of course, Mr. Weatherford did not testify at that preliminary hearing?

A. Oh, no, sir. At that time, Mr. Weatherford was still considered a co-defendant.

Mr. COLEMAN: Thank you. That's all I have.

The COURT: Let me ask you a couple of questions. When you got to the trial of your case in State Court, you said that you and Mr. Wise had advised Mr. Weatherford not to be there?

The WITNESS: Yes, sir.

Q. (By the Court) Did you ever consider that he might be subpoenaed to be there?

A. Yes, sir.

Q. Did he ever say anything about whether he had received a subpoena?

A. He said he had not.

Q. In the event that he was subpoenaed, did you discuss whether or not he would testify or would take the Fifth Amendment?

A. We discussed—I recall discussing that they would not—I mean, it was my understanding that it would be unlikely that they would subpoena a co-defendant, in that he was still liable for charges and would plead the Fifth.

Q. Where was he sitting in the courtroom when the trial started?

A. I recall distinctly Mr. Weatherford walking into the courtroom in the company of Mr. Strom, and I think Mr. Foard preceded him shortly before, I think as the indictment was being read; and he sat down right in the front; and shortly right after that, Mr. Foard called Mr. Weatherford as the first witness for the prosecution.

Q. He was sitting—

A. On the prosecution's side.

Q. —with the prosecution or behind the prosecution table?

A. Behind the prosecution table, in the benches behind the prosecution table.

Q. Did you or Mr. Wise in your presence ever discuss with Mr. Weatherford the possibility of him being a defense witness for you in your two conferences that you say you had, the three of you? Was it ever considered that he would be a witness for you?

A. I don't recall that being considered, no, sir.

Q. Your idea of the way the case was going to be tried was that Weatherford would not be there?

A. Yes, sir.

Q. Merrick would not be there?

A. Yes, sir.

Q. You would not take the stand?

A. Yes, sir.

Q. And, therefore, you didn't know how the State could prove its case?

A. Yes, sir.

Q. What time of night did the incident take place at the Selective Service office?

A. Around one a. m.

Q. So, you assumed that nobody saw you?

A. Yes, sir.

The COURT: Any further questions?

Mr. MCDONALD: No, Your Honor.

Mr. COLEMAN: None, Your Honor.

The COURT: All right. You may come down.

The WITNESS: Thank you, sir.

Mr. MCDONALD: Mr. Wise.

Clarence Rauch Wise, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. MCDONALD:

Q. What is your name, please?

A. Rauch Wise.

Q. Where do you live?

A. Greenwood.

Q. And are you employed there?

A. I'm a practicing attorney in Greenwood.

Q. And have you been present in Court during the testimony of Mr. Bursey?

A. Yes, I have.

Q. And are you the attorney he has described as the lawyer who represented him in connection with these charges for malicious destruction?

A. Yes, I am.

Q. Will you tell me how you came to be employed by Mr. Bursey?

A. I received a phone call towards the end of March, the exact date I don't recall, from Mr. Bursey, inquiring as to whether or not I would represent him, and he had been recommended by a mutual friend of ours in Columbia—that I had been recommended by a mutual friend of ours here in Columbia. I recommended that he come to Greenwood, to talk with me, which he subsequently did either that afternoon or the next afternoon, shortly thereafter.

Q. Do you recall what was discussed at that initial meeting?

A. At the initial meeting, we discussed what he was charged with; what had happened; people involved and so forth.

Q. Did you discuss Jack Weatherford?

A. Of course, he was mentioned because he was one of the people involved.

Q. Did you determine, based on that conversation, that it would be appropriate for you to talk with Mr. Weatherford?

A. Based on the conversation, I determined it was appropriate for me to talk with as many people as I could that were going to be involved in the case, one of whom would be Jack Weatherford.

Q. At that initial meeting with Mr. Bursey, did you discuss the possibility of there being a Government agent or informer?

A. Well, it seemed to me, under the nature of the case, due to the fact that they were arrested the next day, it was quite obvious that there was an informant or I think in conversations with Mr. Bursey, the idea of an eyewitness across the street had been pretty well dispelled. It looked like more than likely there was an informant involved.

Q. Did you discuss the possible identity of—with respect to the informant with Mr. Bursey?

A. I talked about the various people involved, as far as how he knew them, how long he had known them, and so forth.

Q. Did you ever discuss the possibility of Mr. Weatherford's being an informant?

A. Well, I explored the possibility of everybody being an informant, Mr. Weatherford being included.

Q. This was at this initial meeting?

A. Right. Well, I might say the idea of Mr. Weatherford being an informant was my suggestion, not Mr. Bursey's. He was—had known Mr. Weatherford for great deal length of time, and I hadn't known anybody. My idea at that time was to explore everybody as a possibility.

Q. How long did this initial meeting last?

A. I would say several hours. I believe it was after dark when he left.

Q. At that time, did you discuss such matters as plea bargaining and the possibility of Mr. Bursey being a witness?

A. At that time, I think Mr. Bursey indicated he was—desired to plead not guilty and was retaining me to look into the case and advise him, so we didn't discuss it at that point, no.

Q. Now, did you have occasion subsequently to talk with Mr. Weatherford in the company of Mr. Bursey?

A. Yes, I did. Subsequently, at my request, Brett contacted Mr. Weatherford, and at that time, Brett was living out of the City of Columbia, at what he called his country estate, which was a little small house out in the country; and Mr. Weatherford met there with me. I believe it was late Saturday morning or early Saturday afternoon.

Q. When would that meeting have been?

A. That would have been, as near as I can recall, the third Saturday in April.

Q. Would this have been the meeting about which Mr. Bursey testified as the first pre-arranged or formal meeting?

A. That's correct.

Q. Now, who was present at that meeting?

A. When—well, when Jack and Brett and I talked, it was just Jack and Brett and I. I believe—I'm not sure—that Brett's wife was there, but she wasn't there while we were talking. She might have gone and left, but she was not there while we were talking.

Q. How long did that meeting last?

A. Hour, hour and a half. I don't recall specifically.

Q. Do you recall what you discussed at that meeting?

A. Generally, we discussed aspects of who the informant was. I was interested in getting Jack's opinion of everybody else involved, how long he had known them, what he knew about them, and so forth; discussed some aspects of the case, you know, the possibility of an eyewitness across

the street; and we discussed—I think just generally—talked to Jack in general for me to find out what he was like, what type fellow he was.

Q. Did you form any opinion as to the possibility of his being an informer as a result of that conversation?

A. As a result of that one conversation, I really don't think I could say I formed one opinion or the other concerning him. Any opinion I formed was over a period of time.

Q. What did he say specifically about the matter of there being an informer or possibility of there being an informer?

A. As far as quote-unquote words, I cannot say. The general context of the conversation was that—I think we all agreed there was an informant, and Merrick's name was mentioned as being a good probability, due to the fact that he hadn't been arrested and had fled the State and nobody had seen him since the incident.

Q. Did Mr. Weatherford indicate that he was or was not an informer?

A. Well, we were discussing who the informer was, and he never said, "I was an informer," so to that extent, it would be an indication that he was not an informant.

Q. Did he indicate that he suspected Merrick?

A. Yes, along with our same suspicion of Merrick.

Q. All right, sir, now, you said that you discussed other aspects of the case. Will you tell me what they were?

A. As far as specifics, again, it's difficult, but I believe, just generally, I believe the fact that—severance of the two defendants, things like that, along that line.

Q. Will you be more precise, if you can? What did he say about severance?

A. I don't recall precisely what he said, but the general context of it was that he was going to be severed as far as a co-defendant with Brett.

Q. Did you discuss the possibility of anyone entering a plea of guilty in connection with the charges at that meeting?

A. I don't recall whether I did or not at that time.

Q. Did you discuss who the witnesses for Mr. Bursey might be at that meeting?

A. I don't believe at that itme, because we hadn't gotten into the case enough to decide precisely along that lines we would proceed.

Q. Who did—did you do most—who did most of the talking in the meeting? I want you to describe whether it was a question of interrogating him or mutual discussion.

A. It was a case of my asking him questions and he answering, also not only about the case, but, as I mentioned, about his personal background and so forth, along that line.

Q. Tell me, did you have occasion to see Mr. Weatherford thereafter?

A. Well, as far as specific instances, I cannot recall any specific instance, when we went up to Mr. Weatherford's house and talked with him concerning it. I do know that from the time of the initial meeting with Jack Weatherford to the day of the trial, I was in and out of Columbia a great deal, because I was at that time dating a girl who went to the University of South Carolina and was down here every weekend, every other weekend just about. During the course of those some four months, I did get to know Mr. Weatherford, and he would be a person that I would see in Columbia. There would be occasions that—at that time, the girl he was dating, Walker Maybank, was serving on the State Board of the ACLU with me, and at some ACLU parties, he would be there, and we would talk more socially than business; but there was just from my feelings of, you know, how well I knew Jack Weatherford, there had to be several contacts between the initial meeting and the trial, because, you know, he became what I consider a very likable person.

Q. Now, did you meet in a pre-arranged or formal way with Mr. Bursey and Mr. Weatherford prior to trial, other than this one instance that you talked about?

A. The other time would be shortly before the trial—and I can't remember whether it was Wednesday, Thursday or Friday afternoon—but I was in Columbia during some aspect of the case, had been by Brett's house, and, as I recall it, had suggested that we meet with Jack. We called, I

believe, his house and nobody was there and called over at Walker Maybank's house. We either called or just went by, expecting to see him, and anyway, he arrived shortly after we got there; and I talked with him then about whether he had been contacted by the State to testify. I talked with him; he said he had not. I talked with him about the aspect of what would happen if they did offer to release his brother or make some deal in relationship to his brother to testify. He indicated to me at that time that he would not testify and would not be a witness for the State.

Q. Did you discuss with him what your strategy would be in defending Mr. Bursey at his trial?

A. Well, in trying to ascertain whether or not he was going to plead guilty and testify for the State, I think we did discuss the aspect or fact that by that date I had learned Greg Merrick would be out of town or out of the country during the course of the trial, and that that would eliminate that person as far as putting Brett at the scene of the crime and leaving the only other person Jack Weatherford, and the general sum and substance of the conversation was that he was not going to testify and would not be in court. I recommended that he not appear as a spectator in court that day, and he said he would not.

Q. Did you discuss with him the belief that in Merrick's absence and the absence of his testimony, that the State would not be able to prove by direct testimony that your client was present at the Local Board?

A. Right. I think the sum and substance of it was without either Jack testifying or Greg testifying, as Brett said, there would be a fighting chance with the jury under those circumstances.

Q. Had you known—let me ask you before I go to that—did you discuss the possibility of Mr. Weatherford being subpoenaed?

A. He said he had not been contacted. He was not going to be in court; therefore, I assumed he had not subpoenaed.

Q. Did you ever discuss with him the possibility of his testifying as a witness for Mr. Bursey?

A. We never did discuss that, due to the fact that he was a co-defendant; and, of course, if he testified, he would be implicating himself, so that thought never crossed my mind.

Q. Now, did you have any reason to believe, based on the various contacts which you have described you had with Mr. Weatherford, that he was a Government informer?

A. None whatsoever.

Q. Would it be fair to say that you had been led to believe to the contrary affirmatively by Mr. Weatherford?

A. Yes, it would.

Q. Now, did you discuss with Mr. Weatherford any details of his own case, as, for example, who he might be represented by?

A. I found out he was represented by Mr. Taylor. I don't recall whether he told me or Brett told me or somebody else told me. I did know that and the fact that they were going to file a motion for severance. Outside of that, I knew nothing about his own particular case.

Q. Did you request a preliminary hearing in Mr. Bursey's case?

A. Yes, I did.

Q. Do you know whether or not Mr. Weatherford requested a preliminary hearing?

A. I do not know.

Q. Was your client actually indicted—Mr. Bursey?

A. He was indicted with Mr. Bursey.

Q. Do you know whether Mr. Weatherford was indicted?

A. Excuse me. Mr. Weatherford was indicted with Mr. Bursey, as far as I recall.

Q. Was there any—I'm sorry.

A. As far as I recall. I really—I think the indictment showed both of them. I'd have to check to be sure.

Mr. MCDONALD: I think we could show that by independent evidence, Your Honor.

Q. At the preliminary hearing, was there discussion of Mr. Weatherford's case?

A. To the extent that it was necessary to mention Mr. Weatherford as being involved by some of the various witnesses, that was the sum and substance of the discussion of Mr. Weatherford's case at the preliminary hearing.

Q. Was there any indication Mr. Weatherford was not a co-defendant?

A. Nothing whatsoever.

Q. Was there indication that he was?

A. Well, obviously, it—still indication that he was. This was Brett Bursey's preliminary hearing. They were arrested together; had been no indication that the charges against Mr. Weatherford had been dropped; so, as far as I was concerned, he was still a co-defendant.

Q. Did you ever have occasion to talk to Mr. Frank Taylor?

A. I had one occasion to talk to Mr. Frank Taylor.

Q. Can you tell me when that was?

A. When that was, I can't precisely say, other than I believe it was shortly after the preliminary hearing and perhaps before I met with Jack Weatherford on that weekend. The conversation might have lasted five or ten minutes. The sum and substance of it was, I think we both agreed there was an informant, and he had no more idea who the informant was than I did.

Q. Did—

A. And he also mentioned that he would file a motion for severance, due to the fact that he didn't want his client tried with my client, due to what he considered the adverse reputation of my client, would work to the prejudice of his client.

Q. And is that the only occasion that you talked with Mr. Taylor?

A. It's the only occasion I talked with Mr. Taylor. He had an assistant in his office, Mr. Jim Spruill, who I knew, and who I had been socially quite a bit in Columbia. I don't recall any specific time I went up to him and said, "What about," you know, "Jack Weatherford's case?" I do know that over the four-month period, he never gave me any indication that he knew any more than Mr. Taylor did about

the informant or anything else. In other words, from the conversation that I had with Mr. Taylor on the first day, in which he indicated he was going to file a motion for severance, and that he didn't know who the informant was, but obviously there had to be one, he never gave me any more information concerning who the informant may be or the fact that his client, as it turned out, was, in fact, the informant.

Q. Now, were you completely deceived as to the fact that Mr. Weatherford was being routinely represented as an actual criminal defendant?

A. I had nothing to indicate to the contrary.

Q. All right. Did you make any efforts other than the interviewing of witnesses to find out the identity of a possible informant?

A. I originally filed a motion with Judge Grimball for discovery, for identity of informant, and so forth. Judge Grimball disqualified himself, due to the fact that he had served on a national board involving the Selective Service System, and since the Selective Service office was involved, he saw fit to disqualify himself. I subsequently renewed the motion at trial with Judge Baker and it was denied.

Q. What was the reason for denying the motion?

A. Well, at the trial, Judge Baker said I should have made it sooner and then dismissed it offhand, in that manner.

Q. Do you recall whether or not the judge indicated subsequently that he would have denied the motion on the merits?

A. I don't recall. I do know that the South Carolina Supreme Court has indicated that it would have been proper to have denied it on its merits.

Q. Now, Mr. Wise, what effect did your—did the lack of knowledge you had of Mr. Weatherford's real status as an informer have on the way you represented Mr. Bursey?

A. Well—

Q. And I would like for you to address your remarks to the strategy you adopted and also how you actually functioned as an attorney during the trial of the case.

A. Well, the first effect was, if Mr. Weatherford's identity had been revealed sooner, then the entire strategy of the case would have been obviously changed. When you have a SLED agent appearing as an eye-witness against you, it changes the complexion of the case a good bit, to the extent that I would have probably impressed upon Brett the necessity of his entering a plea in the matter, due to the fact that with an undercover SLED agent being with him, the probability of conviction was almost a hundred percent. That aspect would have changed. Additionally, if Brett had been adamant in the fact that he didn't want to enter a plea of guilty, the possibility of exploring Mr. Weatherford's background for finding something there that would be an indication of his—you know, some way to impeach him would have been a possibility which was not explored, due to the fact that we had been led to believe he would not testify.

Q. Was your decision to have Mr. Bursey either testify or not testify affected in any way by the revelation of Mr. Weatherford?

A. Well, the decision to let Mr. Bursey testify was simply based upon the fact that after Mr. Weatherford testified, we felt that—you know—the light or the atmosphere that had been painted concerning Mr. Bursey was none too favorable, and subsequently, we believed that with Brett testifying, that it would help dispel some of that atmosphere or light; so it was predicated solely upon Mr. Weatherford's testifying.

Q. Had you ever considered that Mr. Bursey would actually testify?

A. I had not.

Q. Had you prepared him for direct and cross examination?

A. No, we had adopted the position from the beginning, due to the fact that Brett obviously admitted his participation in it, that he would not make a particularly good witness for himself; so we had never explored the possibility of his testifying.

Q. Did you have an opportunity after the trial had started and Mr. Weatherford's identity was revealed to prepare Mr. Bursey for cross examination?

A. We had a short recess after Mr. Weatherford testified, part of which was spent discussing the case with Judge Baker in chambers, and part of which was spent very briefly talking with Brett about his testimony; but it wasn't more than five or ten minutes at the most.

Q. What was said at that conference with Judge Baker?

A. Well, Judge Baker—we discussed the possibility of entering a plea of guilty. Judge Baker's response was that if a plea of guilty were entered to both counts, he would sentence him to one year consecutive on each count, which would be a total of two years.

Q. Did the prosecution participate in that discussion of sentence?

A. I am very sure Mr. Foard was there, yes.

Q. Do you recall what the posititon of the State was in the case, as far as entering a plea?

A. It was, I guess, what you would call very "hard-nosed." They indicated a desire to see Mr. Bursey incarcerated, as I recall it.

Q. Mr. Wise, have you had occasion to represent other defendants in criminal cases?

A. Yes, I have.

Q. Is that a large part or a small part of your practice?

A. Well, it's not a large part, but it's a little more than small, so I handle a fair number of criminal cases.

Q. When were you admitted to the bar?

A. 1969, fall.

Q. Did you feel that your bargaining position, so far as getting a good sentence, was diminished after the trial had started?

A. Well, it had. If—you know—if you know what you are going into before trial completely, you can, you know, assert your position a little better; but once the trial has started, yes, I felt it had been diminished.

Q. Now, were you able—did you ever form an opinion in your own mind prior to the trial that Mr. Weatherford was or was not an informer?

A. Well, by the time—over the period of four months of coming down to Columbia and many of which were, you know, social events as well as times working on this case, and meeting with Jack, I ultimately came to the conclusion he was not an informer.

Q. Did you ever do any investigation into his background with an eye to impeaching—

The COURT: He's already testified that that was one of the problems he had.

Mr. MCDONALD: All right, sir. I wanted to clarify that.

Q. I believe you have told me some of the effects which the revelation of Mr. Weatherford's identity had on the strategy of your case. Have you told me all the effects?

A. Well, one of the effects, you know, it completely changed the complexion of the case in a matter of a few minutes. It—needless to say—disoriented me to some extent to realize that, you know, this person who I thought I had known turns out to be an undercover SLED agent. It was disarming, to say the least.

Q. What effect did that have on the way you actually tried the case?

A. In retrospect, I can't say precisely, other than it is difficult, I think, in many ways to answer that question, because of the fact that it was a startling revelation to myself and to Brett and to his wife, and to the extent it was a startling happening at the trial, it would bother you to that extent. Beyond that, I can't say whether there were questions that, in re-reading the transcript, I wouldn't have asked that I did ask or questions that I would have asked now that I didn't ask. That's true in any case you try, but I am sure there were also some in this.

Q. Do you recall whether or not it had any impact on the way you cross examined Mr. Weatherford specifically?

A. Well, specifically, it, of course, prohibited—you know, well, the lack of background information was one problem, and the other specifics was that at the time when

I did cross examine him, it was still—it was still hard for me to believe too.

Q. What witnesses did you call in defense of the charges?

A. The only witness we called was Brett himself.

Q. Do you now believe that you might have called other witnesses, had you known the identity of Mr. Weatherford?

A. Had a background check of Jack Weatherford revealed information that we deemed necessary in impeaching witnesses, along that line, yes.

Q. Now, Mr. Bursey has testified that no appeal was taken. Can you tell me why the decision was reached?

A. We originally started the appeal and went to the stage of filing the transcript of record, which was—Brett had it printed up, so the cost of that was very nominal to myself, as far as time was concerned. I then conferenced with him, December, January—I don't recall exactly when—and advised him that, you know—I believe it was in December—that if it was necessary to prepare a brief for perfecting the appeal, that it would be necessary for additional monies to come forth, that the probability of a successful appeal I rated as very, very slim, and I think he made a decision from there.

Q. Why did you think the possibility of prevailing on an appeal was slim?

A. Well, I think one of the problems was the fact that due to the fact that Brett did testify and did admit that he did participate in some aspect of the crime charged, that the Supreme Court would be not very willing to reverse a conviction such as that. Secondly, I didn't think the Supreme Court would be particularly receptive to a discovery motion in criminal court, and I believe since then the Supreme Court has denied a discovery motion, although they have granted some to a very limited extent.

Q. Mr. Wise, let me direct your attention, if I may, back to Mr. Weatherford. Have you discovered anything subsequent to the trial which leads you to believe might have furnished a basis for impeaching his testimony?

A. Subsequent to trial, I did learn that he had been arrested on a narcotics conviction back in the latter part of '69, I believe.

Q. And did you understand that that related in some way to the role which he played?

A. Well, I understand that the charges were dismissed, and it was the basis by which he was contacted for doing work for SLED.

Q. Did you discuss plea bargaining with Mr. Bursey? I don't want to be repetitive. I don't believe I asked you whether you discussed it with him or not.

A. Prior to the trial, I believe Mr. Bursey had rejected it pretty much out of hand. After Mr. Weatherford's testimony, I did and I told him we had discussed it with Judge Baker and that he had said he would sentence him to two years and that was rejected.

Q. And what was the sentence?

A. Eighteen months.

Q. You have mentioned that you met with Mr. Weatherford socially and otherwise following Mr. Bursey's arrest and prior to trial. Do you recall discussing anything that pertained directly to Mr. Bursey or Mr. Weatherford's case?

A. Other than the two incidents that have been mentioned, I don't recall any specific one conversation, but the sum and substance of the several meetings were the, you know, continued strengthening of the belief that he was not an agent.

Q. Do you know whether or not Mr. Merrick was ever charged?

A. As far as I know, he was not charged.

Q. Now, do you know or do you have any reason to believe that Mr. Weatherford leaked or relayed any informations concerning the case—which he might have gotten from you—to the prosecutor or any other State official?

A. No. In other words, Mr. Weatherford has never come up to me and said, "I leaked this—"

Mr. COLEMAN: Your Honor, I can't hear.

The WITNESS: Excuse me.

Mr. COLEMAN: Can you speak a little more—

The WITNESS: Mr. Weatherford nor Mr. Foard ever came up to me and said, "He leaked this; he leaked that." The only indication I would have would be of the apparent last-minute strategy of the State as far as not using Mr. Weatherford to using Mr. Weatherford.

Q. How do you know that the State planned not to use him?

A. I believe Mr. Weatherford stated that—in my cross examination of Mr. Weatherford, I asked him if he told me last week that "You were not going to be in Court," and he said that he did, that he wasn't notified until that morning or—I believe it was that morning, which would indicate a last-minute change in strategy to me anyway.

Q. Following Mr. Bursey's arrest and prior to his trial, did you ever have occasion to request Mr. Weatherford to relay information to Mr. Bursey?

A. If I were passing through Columbia or in Columbia and were not able to get in touch with Brett himself, if Mr. Weatherford were available, you know, I would relay messages, just as I did with some other individuals; but as far as a specific message on a specific date, I can't recall that.

Q. You testified, I believe, that the revelation of Mr. Weatherford's identity had an impact on you at the time this occurred. How long did it take that impact to subside?

A. Well, it's—well, to some extent, it's still the topic of conversation. I think this was the first time it had been revealed that an agent of SLED was attending the University of South Carolina in an undercover capacity. I would say really it would be several weeks or so later before I, you know—you could say it completely subsided or nearly did or most of it.

Q. Did you have any reason to fear that Mr. Bursey might be in danger from anyone in connection with these charges or the sentence he got?

A. Well, Mr. Bursey relayed to me the fear that he mentioned on the stand today, and he was relaying it to me at the time that he made the decision to leave the State.

From my knowledge of him, I believe he believed them to be real, the threats.

Q. All right. Have you had occasion to discuss Mr. Weatherford's role in this entire affair with him or with Mr. Strom subsequent to the trial?

A. Not with either Mr. Weatherford or Mr. Strom.

Q. With anyone else?

A. I discussed it with one undercover SLED agent in Greenwood, subsequent to this.

Q. Did you learn anything which might have informed you or aided you in defending Mr. Bursey?

A. I was informed from that agent that Mr. Weatherford's role was simply to attend the University of South Carolina in an effort to get something on Brett Bursey.

Mr. MCDONALD: Thank you very much. If you will answer—

The COURT: We'll take the cross-examination after lunch, Mr. Coleman. We'll recess at this time until 2:30.

(1:15 p. m., recessed to resume at 2:30 p.m.)

(2:30 p.m., trial resumed.)

Clarence Rauch Wise, continued

CROSS EXAMINATION

By Mr. COLEMAN:

Q. Mr. Wise, you do criminal practice and have done so since you became an attorney in private practice?

A. Yes, sir.

Q. I believe I remember from your testimony that you laid great stress on the fact that you were surprised, amazed, what have you, at the fact that Mr. Weatherford would testify for the State in this case?

A. Well, I was surprised primarily at his revealing himself as a SLED agent. I was also surprised at his testimony, due to the fact that just days before, or—he had indicated he would not be testifying.

Q. Mr. Wise, when there are two defendants or more in a case, in a criminal case, particularly when each defendant is represented by separate attorneys, isn't there always the possibility of one of the defendants plea-barganing and testifying for the State?

A. There usually is, but if I may, in my experience since then and prior, there is usually some indication of it prior to the trial actually starting.

Q. But not always?

A. I usually get some inclination of it.

Q. Suppose the bargain was made the morning of the trial.

A. Well, if the bargain was made the morning of the trial, of course, you would not know about it. The practice I have generally observed is that the bargaining in such a situation usually goes on a long period of time prior to the trial, due to the fact that the co-defendant's attorney wants to get the best deal and the State wats to give up the least.

Q. Did you depend upon that analysis of the situation, Mr. Wise, and because of that reasoning, completely fail to make any preparation for the possibility of the co-dendant testifying for the State?

A. To a large extent, yes, sir. I think you've got to remember too that in this particular case, the co-defendant was what I considered an intelligent college student, and I handle those type people different than I would somebody that's got a fifth-grade education, just as a matter of course. They are more capable of arriving at a firm decision and sticking by it than somebody with less education.

Q. Are you saying that only uneducated people plea-bargain and testify for the State in certain cases?

A. No, sir.

Q. That wouldn't be necessarily true in this case?

A. No, just a factor that entered into it.

Q. Actually, the fact that Mr. Weatherford was an undercover agent had no effect that would not have been present had he not been an undercover agent?

A. Except for one aspect of it. In the usual plea-bargaining situation, a plea of guilty will be entered out of the presence of the jury and prior to the start of the trial. Had that happened in this case, we would have had an opportunity perhaps to regroup ourselves to some extent.

Q. Again, that isn't necessarily true, is it?

A. No, it's not necessarily but just general practice of being along that line, that I've observed.

Q. Was there any reason that you didn't have access or did you have access, normal access, to ascertain Mr. Weatherford's record or whatever information you might have wanted?

A. The charges in this case that were referred to were eventually dismissed, and I don't think they were—would not be an indictment or anything, as such, in the records of Richland County Court House. The information I picked up was simply talking to people subsequent to the trial.

Q. Did it ever occur to you, after Mr. Weatherford testified, and has it ever occurred to you since, that he might not have known that he was going to be called as a witness in this particular case?

A. It occurred to me. Again, from conversations, there is a probability of the fact that he did not know until maybe the day before or, in fact, as he testified, the morning of the trial.

Q. Then, if he did not know—and, of course, since he was called, he had no choice but to testify, did he?

A. Well, his job with SLED would require that he testify, yes, sir.

Q. Let's get for a moment, Mr. Wise, to your meeting with Mr. Frank Taylor and/or Mr. James Spruill. Would you recite again the facts that led up to that or those meetings?

A. I met with Mr. Taylor, and, as I recall it, it was subsequent to the preliminary hearing, which I believe was held on Monday, the 12th or 13th of April, and it was not a very lengthy meeting. I went in and, as I recall, introduced myself, told him I was representing Mr. Bursey, and, as I recall, I did explain to him the fact that a preliminary hearing had been conducted, and we discussed the aspect of whether or not there was an informer, and he mentioned the fact that he was going to sever his client from Mr. Bursey, due to the fact that he thought it would be adverse to his client's interest to be tried as a co-defendant with Mr. Bursey; and I told him I could see his viewpont, and I think that was the sum and substance of what we said.

Q. What was the length of the conversation, approximate length, if you can remember?

A. I doubt if it was much over ten minutes, if that long.

Q. Actually, Mr. Wise, wasn't the real result of the conversation little more than Mr. Taylor telling you that he represented a defendant that was in the same case with you?

A. Yes.

Q. And your interests might conflict and he did not wish to discuss the facts of the case?

A. Well, I don't recall going into the great detail of the facts of the case. The other aspect would be that we did discuss the fact that I think both of us concluded there was an informer somewhere, and he knew no more about the identity of the informer than I did.

Q. And that is about the sum and substance of your conversation?

A. Right.

Q. Now, I believe you submitted an affidavit in connection with this case that has been filed with the Court?

A. Yes, sir.

Q. Would you look at this and tell me if it's correct? (Hands paper to witness.)

A. This appears to be the copy of the affidavit I submitted.

Q. Reference is to an affidavit signed by C. Rauch Wise, Attorney at Law, dated October 8, 1973, which I understand has been filed in this Court in connection with this case. Mr. Wise, you say, make a statement on the first page of the affidavit, "I later met with Mr. Taylor and his assistant, Mr. Jim Spruill, and discussed defensive knowledge and tactics and the probability of there being an agent involved in the incident." Now, was Mr. Spruill present?

A. I don't recall if Mr. Spruill was present or not. At the time the affidavit was prepared, I had forgotten Mr. Spruill at that time was a law student. In all probability, he was not. I knew he was in the office, and I did subsequently talk with Jim Spruill, as I said earlier, on a social and somewhat business relationship on this, and he did not know any more than I did either.

Q. In fact, Mr. Spruill had not passed the bar at that time?

A. Right. That's correct. He was still a law student.

Q. Still a law student in Mr. Taylor's office?

A. Yes, sir.

Q. Isn't it true that he did not know until you told him that Mr. Taylor had undertaken any sort of representation of Mr. Weatherford?

A. When I told him—I can't recall when we discussed whether Mr. Taylor had represented him or not, although there were times I did discuss it with him, but precisely when I did and what his reaction was at that time, I couldn't tell you.

Q. Then your statement—and I'm quite sure it was an honest misstatement—Mr. James Spruill was not present during the conversation?

A. Right. I think the intent of the idea there was I had talked with Mr. Taylor and Mr. Spruill, not necessarily together.

Q. And this further statement that you discussed defensive knowledge and tactics, is that true?

A. Well, to an extent, we discussed, "Do you know who the informer is? Have you got any ideas?" This type of thing; the idea of a serverance motion being filed and the reasons for his severance motion, to that extent, yes, sir.

Q. But you say in the affidavit that you discussed defensive knowledge and tactics and the probability of there being an agent involved? Is that true?

A. Like I say, the specifics of what we discussed, I cannot recall, but I do recall discussing his representation of Mr. Weatherford in general, which would necessitate his discussing the motion for severance, the question of who the informer was, and other such minor related matters.

Q. At any time, Mr. Wise, do you recall Mr. Weatherford having sought an audience with you about this case?

A. Well, I don't recall him seeking an audience, nor do I recall him avoiding one.

Q. Do you remember having more than the two meetings about which you have already testified in which Mr. Weatherford was present?

A. Specifically, no, sir; generally, yes, sir, if I may explain. At the—towards the end of my handling the case, when Mr. Bursey was being tried, I had come to know Jack Weatherford, I considered, fairly well, and that could not have been fostered by just two meetings. I think of necessity there would have to be numerous contacts with Mr. Weatherford from that period of time. I had talked with he and Walker on several occasions, but specifically when, I don't recall. One time I do recall was that Walker told me something about a run-in they had with a guy at Sky City or some place as that, because of his long hair. He made some comment to Jack about his long hair, and she related what Jack's comment to him was.

Q. Mr. Wise, during this period of time from the time you were employed by Mr. Bursey until the time of the trial, can you remember anything that Mr. Weatherford might have said or done to indicate to you that he was doing anything other than attempting to maintain his cover as an undercover agent?

A. Well, the continued perpetuation—the straight answer to your question is "No." If I may explain, the continued—as I say—perpetuation of his undercover identity continued to foster the belief in the fact that he was not the agent in this particular case.

Q. Are you saying, Mr. Wise, that you feel that it was Mr. Weatherford's legal duty to inform you of his identity as an undercover agent?

A. Well, perhaps so. That's the question that I think the Courts will ultimately rule on and not me. I do feel, however—

Q. I asked you is that what you were saying?

A. Well, I feel there was a duty not to affirmatively cultivate the type friendship he did.

Q. During what period of time?

A. During the period of time we were preparing for the case.

Q. What, Mr. Wise, did Mr. Weatherford learn about the defense tactics that hampered your defense of the case? I am speaking of something other than the fact that he was a surprise witness for the State?

A. That would be one. Additionally, it would be that I think he knew that we stood a—well, our idea was we stood a fighting chance if he or Merrick didn't testify.

Q. What you are really saying is, if he had not been present on the day of the trial, you would have been in a much better position?

A. Yes, sir.

Q. When you talked to Mr. Taylor, did you talk to him more than once about this case?

A. I don't believe I talked to Mr. Taylor but once.

Q. Did you at that time ask Mr. Taylor's permission to talk to his client, Mr. Weatherford?

A. Now, I don't recall specifically. I can say what my general practice in that is. I generally do. In my handling of criminal cases with a co-defendant, I generally ask if they have any objection if I talk to him, but specifically asking him at that particular time, I don't have any independent recollection.

Mr. COLEMAN: Thank you, Mr. Wise. I have nothing further.

The COURT: Anything further?

Mr. MCDONALD: Just one moment, your Honor.

REDIRECT EXAMINATION

Mr. MCDONALD: Your Honor, I believe that the affidavit Mr. Coleman was examining Mr. Wise about was one of the exhibits to—

The COURT: In connection with the motion for summary judgment.

Mr. MCDONALD: I don't know whether that's been formally introduced into evidence, but I would like to do so at this time. Is that necessary?

Mr. COLEMAN: No objection.

The COURT: All right. He has no objection to it.

(Affidavit received into evidence as Plaintiff's Exhibit 1.)

Mr. MCDONALD: I just have one or two very brief questions, your Honor.

The COURT: All right.

By Mr. MCDONALD:

Q. Did you discuss the whole question of bail with Mr. Weatherford?

A. I recall discussing with him about his bail and how he got out, and he mentioned that he had a doctor friend of the family that arranged for his bail.

Q. Do you recall the name of the doctor?

A. I don't recall the name of the doctor. I can't even remember if he was a medical doctor or a doctor at the university.

Mr. MCDONALD: Thank you, sir.

Mr. COLEMAN: I have nothing further.

The COURT: You may come down.

Mr. MCDONALD: Your Honor, we would like—I don't know how to—we deposed Mr. Strom and Mr. Weatherford, and we would like to introduce their depositions into evidence.

The COURT: Do you want to introduce the whole thing or just parts?

Mr. MCDONALD: There are certain parts that we would like to call to the Court's attention, but I am assuming that—well, it may not be necessary to do that if they are called as witnesses.

The COURT: All right, so far as your case stands at this point, then I understand you are introducing all the depositions of both witnesses?

Mr. MCDONALD: Yes, sir.

The COURT: All right.

Mr. MCDONALD: Of course, we could call the Court's attention to particular parts thereof that we deem relevant.

The COURT: I'll read the whole thing.

Mr. MCDONALD: All right, sir. Your Honor, I don't recall whether or not a copy of the transcript of Mr. Bursey's trial and preliminary hearing was formally introduced in evidence.

The COURT: It hasn't been, although there is a copy that may have been introduced in connection with the motion for summary judgment—I have forgotten—but there is a copy in the file.

Mr. COLEMAN: We have no objection.

The COURT: This is just of the trial, now. I don't believe the preliminary hearing—

Mr. MCDONALD: The transcript of that is very brief, your Honor, and it's sixteen pages—

Mr. COLEMAN: Here's one.

The COURT: If you want to introduce that, that will be fine.

Mr. MCDONALD: We move the introduction into evidence of both of those documents and the affidavit, two depositions, and that will be the plaintiff's showing.

(Transcript received into evidence as Plaintiff's Exhibit 2.)

The COURT: All right, the plaintiff rests?

Mr. MCDONALD: Yes, sir.

The COURT: All right.

Mr. COLEMAN: Chief J. P. Strom, come around and be sworn, please.

J. P. Strom, first being duly sworn, testified as follows:

DIRECT EXAMINATION

Mr. COLEMAN: Your Honor, before we go into Mr. Strom's testimony, we would move at this time for the same—for a verdict in favor of the defendants on the same grounds as our summary motion.

The COURT: I will overrule it on the same grounds. I think I stated very clearly in the order, in overruling the motion for summary judgment, that there is a point in time that an undercover agent has got to get out of the picture; and from the plaintiff's case, viewing it in the light most favorable to the plaintiff, which I have to do at this time, they exceeded that point.

Mr. COLEMAN: I understand, sir. I was simply making the motion for the record.

The COURT: Right.

By Mr. Coleman

Q. Chief Strom, you are the Chief of the South Carolina Law Enforcement Division?

A. Yes, sir.

Q. How long have you been in that job?

A. I have been with the Law Enforcement Division since 1947. I have been Chief since 1956.

Q. As Chief of the Law Enforcement Division, South Carolina Law Enforcement Division, what connection, if any, do you have with the security personnel of the University of South Carolina?

A. It's the responsibility of the South Carolina Law Enforcement Division—we have jurisdiction over the State-supported colleges, the University, Medical University in Charleston and different State agencies, not including the Penitentiary and State Department of Mental Health. The others, we do have jurisdiction. By statute, it is our responsibility to supervise the operation.

Q. In connection with the defendant Jack M. Weatherford, do you know him?

A. Yes, sir.

Q. When did you first know Mr. Weatherford?

A. I knew him prior to '69. I knew him through—first through Deputy Sheriff Sonny Clark, of Richland County.

Q. And did he enter into employment with you?

A. I believe he started in August, of '69, and stayed with us through September, of 1970—until September, I think.

Q. That was until the—after the trial we are talking about?

A. Yes, sir.

Q. In this case?

A. Yes, sir.

Q. What were the general duties to be performed by Mr. Weatherford, as a result of this employment?

A. During that time, we had a lot of problems at the University of South Carolina, as well as other places, and it was necessary for me to have certain information as to what was happening on the campus or what was going to happen. I had to have information to make a judgment, so I would know if a demonstration—or at one time, they took over the Administration Building; and I had to have information prior to the time these things were going to hap-

pen, so I could have sufficient police to actually protect the law-abiding students and the faculty who were law-abiding.

Q. Was Mr. Weatherford in a favorable position to serve in a capacity of an under-cover agent?

A. He was.

Q. Why?

A. Because he was a student and he knew people and he was smart, and he knew how to do things and how to get information and to evaluate it.

Q. Chief Strom, what were the territorial limitations of the—of Mr. Weatherford's activity as an agent of SLED?

A. I asked him to notify me or some of the agents—he knew Ronnie Cook, Lt. Powell, Sonny Clark and Captain Gasque—gave him a lot of names, so he could get in touch with some of us, in the event something was going to happen and he would get information one night, it may happen the next day.

Q. These were reports of things that were happening or might happen, in which you were interested. Was it confined to things in and about the University of South Carolina?

A. He—on occasions, I think he went to Charleson, maybe Myrtle Beach; anything connected with a violation; would not necessarily have been confined to the college campus.

Q. Was Mr. Weatherford's assignment confined in any sense to a surveillance of the activities of the plaintiff Bursey?

A. No, sir.

Q. What else did it entail? Can you give us a general idea?

A. It entailed anything that may create a police problem or a problem for the orderly operation of the University of South Carolina; so, actually, anything dealing with drugs, stolen goods, and so forth.

Q. How did Mr. Weatherford make his reports to you; how did he get his information to you?

A. He would make them on the telephone, not necessarily to me but to some of the other officers, and we would

know pretty well what was going to happen, and we would have sufficient men available to try to take care of the situation.

Q. And was Mr. Weatherford paid by SLED for this activity?

A. Yes, sir.

Q. Do you remember the amount of the salary?

A. I think SLED paid him about $5300 in all, at the rate of about a hundred dollars a week. I think that's about right.

Q. Did his pay depend upon how many cases he informed you about?

A. No, sir, we just gave him so much money, and he took his expense out, unless he was out of twon, and worked for that. No cases had a thing in the world to do with it.

Q. Do you remember the first information you got from Jack Weatherford with regard to the Draft Board incident or what ultimately resulted in the Draft Board incident?

A. He didn't report that to me direct. I believe it came through maybe Sonny Clark and Lt. Powell. I don't know which one, but they had the information.

Q. They are officers of Richland County, I believe—Sonny Clark?

A. Yes, sir, and Walter Powell is a lieutenant of South Carolina Law Enforcement. I don't know which one he told, but he didn't tell me direct to start with.

Q. Did you know about the Draft Board incident before it happened? Did you receive information it was going to take place?

A. Yes, sir, we had information they was going to bomb the Draft Board, going to tear it up, and different things was going to happen to it and—

Q. What action did you take, if any, as a result of that?

A. Lt. Walter Powell and the other officers, they staked themselves out in the Draft Board and around it with a ring, and they came and did the damage and got away, and they didn't catch them that night.

Q. How did you get the information relative to Mr. Weatherford's participation in this incident?

A. He called in and left word as to who they were. I don't think he knew one of them's name, but I got the information and the names of who was there the next morning.

Q. Thereafter, Chief Strom, did you have occasion to personally see Mr. Weatherford, Mr. Jack Weatherford, on any occasion until the trial of this matter in 1970?

A. I don't remember—I may have seen him around, but I don't believe he came to the office and discussed it with me, and as far as I know, I didn't have any further discussion with Jack Weatherford.

Q. Had you obtained any sort of statement from him with reference to the facts?

A. No, sir.

Q. That had been communicated verbally to either you or some of your subordinates?

A. Yes, sir.

Q. Did you know that Mr. Weatherford was represented by Mr. Frank Taylor?

A. I don't believe I knew he was represented by Mr. Taylor. I could have. I'm not sure. I knew on the morning of the trial. I know I knew it for a fact at that time. I didn't make any arrangements about getting Mr. Weatherford out of jail or such things as that.

Q. That's the sort of thing you more or less turn over to the solicitor?

A. Yes, sir. The solicitor was there that morning in our office. I don't know why he came, but he was there on other business. I didn't call him, and he stayed with us most of the day and made the decision on this case.

Q. That's the solicitor?

A. Yes, sir.

Q. Did you know, Chief Strom, prior to the morning of the trial, which, I believe, was March 20, 1970, that Mr. Weatherford was to be used as a witness for the State?

A. I did not. As far as I was concerned, we had no intentions of using him.

Q. Why, if you know, Chief Strom, was not Jack M. Weatherford's identity as an agent, as an undercover agent of SLED, made known immediately after the Draft Board incident?

A. Well, we had other problems at the university, and I discussed it with the solicitor, and we thought it was a good idea to keep him under cover, you know, for a while longer, to see what other things he could come up with, so we could maintain order on the campus.

Q. That was in connection with his undercover activity generally?

A. Yes, sir.

Q. Had no specific reference to the Bursey incident?

A. No, sir.

Q. Did the fact that Mr. Weatherford's identity as an undercover agent was not revealed until the morning of the trial have anything whatever to do with the prosecution of Brett Bursey?

A. Not so far as I know, no, sir.

Q. Did you have any discussion with the solicitor with reference to the prosecution of this case prior to the morning that it took place?

A. No, sir. When we walked in the Court House—we got there fairly early—as far as I remember, the solicitor asked me if I had any objection to Weatherford testifying. I said, "I don't have any objection to him testifying if he wants to testify." And we had a little conversation about it. I said, "I don't think he would have any objection." It had already been fairly well known that he had been seen with the police down at Hilton Head, little talk about that, and as far as I was concerned, I didn't think he could operate effectively as an undercover agent any more. As a result of that, I went to the telephone and called Jack Weatherford. I figured if he went to school, we wouldn't be able to find him—that was on the morning of the trial—and asked where he would be in the event the solicitor wanted him. I believe he said he would be at the Hamilton Building.

Q. It was not your decision but that of the solicitor?

A. It was not my decision, whatsover. I didn't have any idea of using Jack Weatherford. I thought we was going to use Finney, because he said that Brett Bursey wrote the note; he copied it; and the note was retrieved from the Draft Board; and he could identify it, as far as I know. I didn't have any notion in the world of using Jack Weatherford.

Q. At any time, dating from the Draft Board incident up to the time that Jack Weatherford testified at Bursey's prosecution, did he make any report to you with regard to anything that he might have learned about the defense strategy being planned by Bursey and his attorneys?

A. No, sir, I had no interest whatsoever. He didn't tell me and I wasn't interested in trying to find out.

Q. As far as you know, was any such information passed from Weatherford to anybody in SLED?

A. No, sir.

Q. So far as you know, did Weatherford furnish any information to the prosecuting attorney or his office in this case?

A. No, sir.

Q. Were you interested in that type information?

A. I was not.

Mr. COLEMAN: Thank you. You may cross-examine.

CROSS EXAMINATION

By Mr. MCDONALD:

Q. Mr. Strom, I believe you testified that you did not know that Mr. Weatherford was going to be a witness at Mr. Bursey's trial?

A. I didn't know it, no, sir.

Q. Had you known that he was going to be a witness, what would you have done, if anything?

A. Well, the solicitor knew the whole case, and we make reports to the solicitors and prosecutors generally throughout the State of South Carolina, and we are advised by the solicitor. Had I known if Bursey had—if Jack Weatherford had violated any law and I knew about it, I would have reported it to the Court.

Q. Had you known for sure that Mr. Weatherford would have been a witness, what would you have done as far as Mr. Weatherford was concerned?

A. I don't know as I would have done anything. I mean, he didn't have any objection to testifying, and I didn't know that there was any question about whether his testimony was admissible or not, so I don't guess I would have done anything. The solicitor suggested he testify, and I always take the advice of the solicitor.

Q. As far as his cover or Mr. Bursey is concerned, you would have done nothing, whether you knew he was going to be a witness or not?

A. I told—you mean, on his protection?

Q. Right, sir.

A. I asked him if he was afraid. He said he was not, and had he wanted protection, I would have made it available to him, and I offered him a regular job, and he turned it down.

Q. What I am driving at, Mr. Strom, and I'm probably not making myself clear, is that it appeared to me that you regarded it as significant that you didn't know Mr. Weatherford was going to be a witness at Mr. Bursey's trial. What I'm really asking is, why would it have made any difference to you so far as what you would have told Mr. Weatherford to do? Would it have made no difference?

A. I don't know. He was a commissioned police officer.

The COURT: Well, I think what he's getting at—

The WITNESS: I don't understand—

The COURT: —Chief Strom, if you had known the day after the incident or the day of the arrest that the solicitor planned to use Mr. Weatherford as a witness, would you have called him off the case? Isn't that what you are getting to?

Mr. MCDONALD: Yes, sir.

The WITNESS: Yes, sir, I would have. I wouldn't have had him to meet with them. I wasn't planning to use him as any witness whatsoever.

Q. Why would you have called him off the case?

A. For one thing, I would have figured it would have been pretty dangerous for him to start with, and I wouldn't

have wanted him around. I did not have any idea or intentions of using Jack Weatherford whatsoever. It came as a surprise to me.

Q. When you say you would have called him off the case, what does that mean, so far as law enforcement practice?

A. If it had been known that he was going to testify, it wouldn't have been a good idea for him to subject himself to Brett Bursey and his friends, because, in my opinion, it would have been dangerous for him.

Q. Would there have been any other reason that you would not have wanted him to associate with Mr. Bursey and his friends?

A. He would have been ineffective. I mean, he could not have done any good whatsoever, except probably created a big problem.

Q. Would you have been concerned at all about interfering with Mr. Bursey's rights?

A. I wouldn't interfere with Mr. Bursey's rights whatsoever.

Q. Would that have been one of the reasons you would have called Mr. Weatherford off of the case?

A. I never interfere with a man's rights. As far as I knew, we were protecting the Draft Board, that protects the United States of America, and I had a deep interest, and I did everything I could for a solution to this case; but as far as violating Mr. Bursey's rights, no, sir. I would not do it intentionally.

Q. Would that have been one of the reasons for which you say you would have taken Mr. Weatherford off the case?

A. I don't think—as far as I know, Mr. Weatherford wouldn't have intentionally violated his rights. He's a very honorable man.

Q. Well, I don't believe—I'm not making myself clear. You are not answering my question directly. Would that have been one of the reasons that you would have called the agent off the case, so he couldn't have associated with the accused and his friends or his attorneys?

A. I don't see—I'm not going to violate Mr. Bursey's rights or anyone else's rights.

Q. Would that have been one of the reasons you would have called—

A. I have been to schools in Washington on probable cause, had the best instructors in the country, and I know a man's rights—at least, I think I do; and if I violated a right, it would never be my intention.

Q. Did you learn about the Sixth Amendment right to counsel at these schools you just mentioned?

A. I know I wouldn't send a man in where a lawyer and client relationship—if I knew it, I wouldn't let him go.

Q. Why would you not, Mr. Strom?

A. Well, because it would be a violation.

Q. Had you known what was going on with Mr. Weatherford and Mr. Bursey and Mr. Wise, would you have permitted that to continue?

A. I don't think it went on, because you have got other witnesses that will testify in this case, and, of course, you'll have to find out what happened. Nobody reported it to me.

Q. Had somebody reported to you that one of your agents was participating in defense consultations, would you permit that sort of thing?

A. No, sir.

Q. Why would you not?

A. Because it wouldn't be ethical; wouldn't be legal.

Q. Do you think that would be a violation of the Sixth Amendment right to confer—

A. As far as I know—

Mr. COLEMAN: Your Honor—

The COURT: I think he can ask him. This witness says he has been to school.

Q. Mr. Strom, you described briefly or alluded briefly to the instructions you have had in law enforcement, and I beleieve you said you had some courses on the rights of the accused, people accused of crime? Can you tell me a little more specifically the nature of that instruction, where you received it?

A. Most of our instructions has been on probable cause, laws of arrest, searches and seizures, and so forth.

I don't claim to know all of a man's rights. I don't think anybody does.

Q. Where did you learn what it is you did learn about the rights of an accused? Where was that? What schools?

A. Well, I graduated from the FBI National Academy, and I have been back to school since then.

Q. Can you just briefly tell me some of the schooling you have had since then?

A. Well, the most recent schooling I had was in Quantico, Virginia, where they have the FBI National Academy.

Q. What sort of instruction did you receive there, Mr. Strom?

A. Depends on what type school you go to. Sometimes, they'll have one on probable cause and—

Q. And did you learn about having to say certain things to people that you arrest before you interrogate them?

A. *Miranda* warnings, yes, sir.

Q. Did you learn other aspects of the Sixth Amendment right to counsel?

A. Right to counsel, yes, sir.

Q. Now, would you describe—I'm not trying to be repetitive, but would you describe briefly for me what you expect or what you do as the Chief of the Law Enforcement Division, as far as supervising agents is concerned? Isn't one of your duties to supervise?

A. Yes, sir.

Q. Would that include undercover agents as well?

A. I don't supervise everybody, man to man. We have a general policy, and we have a lot of people working for us, and with their help, lieutenants and captains, we supervise the best we can, day by day.

Q. All right, sir, I believe you testified that you recruited Mr. Weatherford personally. Is that correct?

A. I think I met him through Sonny Clark and was introduced to him, and then he was already on the campus where we needed a man.

Q. But is it fair to say that you personally hired him?

A. Well, of course, I hire everybody, for that matter, but you're probably on advice of somebody else.

Q. Did you give him his job intereview—Mr. Weatherford?

A. I don't think so, but—I just don't think I did, but I knew him generally, and I knew what he could do.

Q. Wasn't he hired after you had a conversation with him? Didn't you testify in your deposition—

A. It could be. It's been so long, you would have to refresh my memory to be sure.

Q. Let's see. Let me direct your attention to Page 9 of your deposition and—

Mr. COLEMAN: Let him read it, counsel.

Q. Look at it and refresh your own memory. (Hands to witness.)

A. Well, I said the first I heard of him was through Clark.

Q. Will you tell me whether or not your memory is refreshed and you can recall it if you interviewed Mr. Weatherford and if you, in fact, hired him yourself?

A. Do you know where that is?

Q. It should be in that section there.

A. I think I testified there I wasn't sure. See, there was so many things going on then, that—there was lot of unrest on the campus and I talked to a lot of people and lot of things going on; and I just don't quite remember everything that happened back then during that time.

Q. Don't you testify on Page 10 that—you said, "I'm sure I talked to him," and isn't there a discussion thereafter about the instructions you gave Mr. Weatherford, and I believe you talked about the rate of pay and what you expected him—

A. Well, I tell you what generally my instructions are on any undercover agent that is going to do any type undercover work, whether it's safe robbery or whatever it may be: I warn them not to implant any thoughts to create a situation, but only to listen and keep me or some of our agents advised as to what's going to happen. That's my general instructions.

Q. Do you recall instructing Mr. Weatherford about his duties as an undercover agent?

A. I'm not sure; but if I did, that's what I told him, because that's what I instruct everybody.

Q. Don't you recall testifying under oath at the deposition that you did instruct him?

Mr. COLEMAN: If your Honor please, I ask that the rule be followed and that the witness—

The COURT: Well, you asked him to use the deposition to refresh his memory. Now, if he wants to lay the proper foundation, he should ask the question and read the answer; but you suggested this way of doing it.

Mr. COLEMAN: That's all right.

A. "Well, I'm sure I talked to him. He was a student at the University, and I think we started paying him on December 1, 1969, and we quit paying him on September 1, 1970." He was in California.

The COURT: The question is, what did you tell him when you talked to him. Isn't that what you want to know?

Mr. MCDONALD: Yes, sir.

The WITNESS: As far as I remember, your Honor, I told him—I'm going by what I tell all informants, is not to implant a thought but to go with these people, listen to them, and keep us advised of any violation that they may plan to commit, any crime.

The COURT: Not to implant a thought? What you are saying is that they are not supposed to lead; they are supposed to watch and report to you?

The WITNESS: That's correct, yes, sir.

Q. Did you tell him to do anything that concerned the University of South Carolina or people who might have been students there?

A. Well, of course, our interest wast to know what was going on in the way of violations on the entire campus, as much as we could.

Q. And that— did you specifically discuss with him any groups or individuals that you might have been interested in getting information about at the University?

A. Not that I know of. We are interested in all groups that may create a problem or get into some violation of the law.

Q. Did you establish with Mr. Weatherford any procedures for his making reports to SLED about what he saw at the University?

A. Not as I know of. He mostly called in to Sonny Clark or somebody else. Sonny was working at night. Even though he was a Deputy Sheriff, I think he talked to him pretty regular, and he kept in touch with him or other SLED agents.

Q. All right, sir, didn't he make reports directly to you?

A. He could have made a report by telephone to me or something like that, but I wasn't the main man he reported to by any means. I think it was pretty nearly a daily thing or, at least, every night that Sonny Clark or some of the officers would be in touch with him.

Q. And how often were you in touch with him during the time he was hired as an agent, until Mr. Bursey was arrested?

A. It would be very seldom. I mean, I might see him somewhere, but I wasn't the man that was keeeping up with him.

Q. Sir?

A. I was not the man that was keeping up with him on a daily basis.

Q. All right, sir, on Page 15 of your deposition, I asked you, "Will you tell me as best you can remember what kind of conversations you had about Mr. Bursey?" I am discussing conversations which you had with Mr. Weatherford. Your answer: "As far as I remember, it was about the draft board. Mr. Weatherford can tell you by far a whole lot more than I can, because I didn't keep notes. The main thing I was interested in when I started out, I think, was more or less crowd control and knowing how to cope with it." Question: "You got information from Mr. Weatherford that there was to be a raid on the draft board? You mentioned the draft board." "Yes, sir." "Do

you recall when you first got this information?" "I've got two statements here you're probably interested in."

And then you hand me—

A. They are still here, those statements.

Q. They are here, yes, sir, and your attorney may offer them in evidence. And then I queried you about the number of conversations you had with Mr. Weatherford. On Page 16, I said, "Do you recall how many conversations you had with Mr. Weatherford about Brett Bursey during this period of time that he was employed as an undercover agent?" Answer: "No, sir, I don't recall how many, because, you know, most of mine was he called me on the telephone. I'd seldom see him." "Question: Would it be, for example, more than a dozen, or less than a dozen, or more than six?" "Answer: Actually, I don't know, really. I talked to him about Bursey I don't know how many times." "Question: Would it be fair to say that—" "Answer: I'm not going to say it would be fair when I don't know." "Question: Would it be more than once?" "Answer: More than once, yes." "Question: And more than two or three times?" "Answer: It was probably more than two or three times. I don't know how many times." "Question: Did you have any sort of understanding about how Mr. Weatherford was to report to you" (I'm talking about you specifically.) "that is, whether it would be periodically, on Monday of every month, or any routine?" "Answer: No, he would report when—he knew how to get in touch with me. He had my office number, he had my home number; anytime he wanted to contact me, no problem."

Is that testimony correct, as you recall it?

A. Yes, sir. Of course, he had other people's number too.

Q. He was not only in touch with you during this period of time, but other—

A. He wasn't in touch with me that much. He could have been in touch with me some.

Q. Now, what sort of records, Mr. Strom, do—are your agents required to keep?

A. Well, on an undercover agent, we don't require them to keep records. On the regular agents, they keep

records, if they go to Greenville, Charleston. You charge expenses and name the case you are working on and your responsibility.

Q. Did Mr. Weatherford keep any records of any kind?

A. None that I know of.

Q. Does your office or the Law Enforcement Division have any records which were made by Mr. Weatherford?

A. I don't have none if we do. We—

Q. Sir?

A. No, sir.

Q. Did you keep records of any of these conversations you had with Mr. Weatherford?

A. No, sir.

Q. Would that be a usual procedure for law enforcement officers to follow?

A. Yes, sir, on an undercover operation.

Q. Would it be usual for someone who is not undercover, who is receiving information from an agent who is undercover, not to make any note of it?

A. The agents make notes, but you don't make a permanent record of any undercover agent. I don't know of any agent that does.

Q. In point of fact, you took down no notes or transcribed any phone calls you had with Mr. Weatherford?

A. No, sir. The things he would tell us was like—"Going—demonstration tomorrow." Our people would ask him about how many he thought it was going to be. In fact, when they went into the Administration Building, I don't know whether he told us or not, but some undercover agent gave us the information that they were going to the Administration Building; so I brought in extra SLED agents, extra Highway Patrolmen, and in that way, we kept people from probably getting killed next day when they did go in the building, because I already knew it and had people available to go in on the spur of the moment and help.

Q. Did Mr. Weatherford receive instructions about his duties from anyone other than you?

A. I didn't instruct any other person to give him instructions.

Q. Did you give him any different or additional instructions after March 20, 1970?

A. No, sir.

Q. Did you have any conversations with him following March 20?

A. There was a break—you mean between there and the trial?

Q. After March 20?

The COURT: Between the arrest and the trial?

A. No, sir.

The COURT: You never had any contact—

The WITNESS: No, sir.

The COURT:—with Weatherford after the break-in?

The WITNESS: Until I went to the Hamilton House that morning, I don't remember having any conversation whatsoever, but I didn't think he was going to testify.

The COURT: To the Hamilton House?

The WITNESS: Yes, sir. I believe it was the Hamilton House.

The COURT: This is a place on the University?

The WITTNESS: Yes, sir.

The COURT: You went and picked him up?

The WITNESS: Yes, sir. I went at the instructions of the solicitor.

(Pause in proceedings.)

Q. Mr. Weatherford was on the SLED payroll following Mr. Bursey's arrest? Isn't that correct?

A. That's correct.

Q. And do you know whether or not Mr. Weatherford made efforts to retain his cover following Mr. Bursey's and his arrest on March 20?

A. As far as I know nobody—it was being talked, because he was seen around Hilton Head; but as far as I know, he didn't announce it ,and I certainly didn't announce it.

Q. Now, on March 20, 1970, did you have occasion to talk with Mr. Weatherford?

A. No, sir.

Q. Did you have occasion to talk with anyone about the Draft Board case on March 20?

A. I talked to a good many people during that day. I don't know who all they were. I had the names of the people that was with Jack. I didn't have all of them.

Q. Did you talk with the prosecutor, the solicitor, Mr. Foard?

A. Pretty much all day.

Q. Sir?

A. He was out there the best part of the day.

Q. You did talk to him on March 20 about this case?

A. He was there on another case; but when this came up, he was there, and he stayed with us.

Q. So, your answer is, "Yes," you did discuss this case with the prosecutor on March 20?

A. Yes, that's correct.

Q. What was the nature of the conversation?

A. About the statements and the charges that was going to be brought against him.

Q. Brought against Bursey?

A. Yes, sir.

Q. And did you inform Mr. Foard of Mr. Weatherford's involvement?

A. Yes, sir, he knew that, and I was guided by his suggestions during the whole thing.

Q. Sir?

A. I was guided by Mr. Foard's suggestions.

Q. So, you did discuss the case—

A. Well, he knew—Solicitor Foard knew it. I mean, that's not anything unusual. He's out there periodically on any case of serious nature.

Q. Did you discuss the break-in or demonstration at the Draft Board with anyone else on that date? Let me particularly direct your attention to Mr. Finney and Mr. Bolding.

A. Yes, sir.

Q. Tell me what you said with either of those gentlemen.

A. Well, I think I gave them their rights and discussed the case with them. As a result, I believe they both gave us a statement.

Q. Now, did you have any undercover agents other than Mr. Weatherford, who were operating at the University during the period of time of Mr. Weatherford's employment?

The WITNESS: (Addressing the Court) Do I have to tell him if I have—

The COURT: That's four years ago. I don't think it will blow anybody's cover. He just asked did you have any others in the spring of 1970 at the University.

A. He was the principal undercover agent I had at that time.

The COURT: That's not answering the question.

A. That's the only one I had, yes, sir. That was the only one I had.

Q. Have you ever had any other agent other than Mr. Weatherford at the University?

A. Yes, sir.

Q. Mr. Strom, do you recall whether or not you ever told Mr. Weatherford that he ought to contact an attorney following his arrest?

A. I think—I don't know whether I told him or whether the solictior told him. He arranged the attorney business. I didn't.

Q. Who arranged it?

A. Solicitor Foard.

Q. You might have suggested a particular name to Mr. Weatherford?

A. It's possible I could have, but I don't know. He's in Court. He could tell you, but I didn't handle that part of it, as I remember. So many things happen, I can't remember—that I can't remember all of it.

Q. So, your best recollection is that you—

A. Mr. Foard would know. He's here.

Q. All right, now, I believe you testified that you had no conversation with Mr. Weatherford following the arrest? Is that your testimony? You had no conversations following Mr. Bursey's arrest prior to the trial of Mr. Bursey's case?

A. I picked him up that morning from the University.

Q. All right, let me direct your attention now to Page 35 of your deposition, and I asked you the question: "Mr. Weatherford called you and related what had happened at the draft board?" "Answer: Yes, sir." Is that—

A. That would have been nearer March 20, wouldn't it?

Q. That would have been on March 20.

A. I guess that's right; he either called me or somebody else, sir.

Q. That would have been prior to the arrest?

A. Yes, we had to have had the information prior to the arrest, because we picked—arrested those—picked those boys up after we—we didn't pick Bursey up until after we got the statements from Finney and Bolding.

Q. Had you been in contact with Mr. Weatherford immediately prior to the break-in?

A. No, sir.

Q. Yet, you say that you were aware that there was going to be some sort of demonstration?

A. Yes, sir.

Q. How did you get that information?

A. Probably through Lt. Powell, I guess.

Q. Sir?

A. Lt. Powell, I would think.

Q. And Lt. Powell is a law enforcement officer for what agency?

A. South Carolina Law Enforcement Division.

Q. That's one of your agents?

A. Yes, sir.

Q. Had you been in touch with any other law enforcement agencies?

A. No.

Q. County, Federal police, FBI, concerning the demonstration at the Draft Board?

A. I don't know whether I talked to him or not. I did talk to the FBI on a regular basis. I don't know whether I talked to them about that or not. I don't remember.

Q. Now, when you first came into possession of knowledge or information that there was going to be a demonstration there, did you instruct Mr. Weatherford that he ought to attempt to stop it?

A. No, sir.

Q. Can you tell me why you did not do that?

A. Well, if I get information a man is going to rob a safe, if I would instruct him to stop it, I mean, we never would have a violation and all the thieves and crooks would be going wild; so you catch them and take them into the courtroom. Mr. Weatherford wasn't going to take them there, and he didn't have anything against the Draft Board. It was Mr. Bursey's idea.

Q. Is one of the purposes of law enforcement to prevent things from happening?

A. You want to prevent anything that you can. You also want to apprehend people who violate the laws.

Q. Now, following Mr. Bursey's arrest –well, let me direct your attention now to Page 40 of your deposition, Mr. Strom—and I'm asking you some questions now about Mr. Weatherford's activities following Mr. Bursey's arrest on March 20, and the question is: "So the date of the arrest was March 20, and Mr. Weatherford was there through August, or until September 1, 1970. That's about five months." "Answer: Right." "Question: What did he do during those five months? Was he still at the University, being an undercover agent?" "Answer: I think he was going to school, and maybe some type instructor; I'm not sure about that. Of course, when they questioned him, he was known then, but he could still, you know, know what was happening on the campus." "Question: And he was still acting as an agent during that period?" "Answer: Yes, that's right." "Question: And he was making phone calls to you during this time?" "Answer: He made some phone calls; I'm not sure how many after that." "Question: Did you give him any additional or different instructions after March 19, 1970?" "Answer: After the trial?" "Question: Immediately after the incident at the Draft Board had occurred, on March 19, did you give Mr. Weatherford any additional or different instructions?" "Answer: No, not that I remember." "Question: You just told him to keep doing the same thing that he was always doing, or did you even bother to tell him that?" "I don't think I bothered to tell him anything, just a routine matter." "Question: Was it your expectation as his employer that he was going to continue doing the same thing that he had been doing before?" "Answer: Well, I knew of his ability to evaluate a situation, and even though his cover was blown, he still was worth what we paid him." "Question: Right. But was it your expectation that he would be doing the same thing right along that he had been doing?" "Answer: After the trial about the Draft Board you're talking about?" "Question: I'm talking about after the arrest, now, and before the trial." "Answer: I don't think after the arrest anybody knew." "Question: In other words, his cover was still good until the trial?" "I (don't) believe it was (that) good. People, as far as I know, had heard a little something, but I don't believe anybody really knew it for a fact." "Question: So you assumed that his cover was still good after the arrest?" "Answer: I assumed that, yes, sir." "Question: And you didn't modify your instructions to Mr. Weatherford in any way following the arrest?" "Answer: No, sir." "Question: And as his boss, you perceived that he would function in the same way as he had before?" "Answer: As far as I knew, he could, yes." "Question: So, I mean you didn't try to hire any other agents to do some of the things that he had been doing?" "Answer: No, sir." "He was still your man at the University and you felt he could function that way?" "Answer, Yes, sir."

You testified at your deposition, I believe, that you did have some phone conversation with Mr. Weatherford following Mr. Bursey's arrest. Would you like to explain that?

A. Well, if I had any telephone conversation, it wasn't anything of any real value, because I don't remember it. If he had called me and said they was going to break in a building or a dormitory or something that I could remember—

Q. All right, sir, but you do say that you had access to him and, in fact, you did talk to him?

A. I could have gotten in touch with him, yes, sir.

Q. I mean, you had actual access to him, did you not?

A. I could have contacted him if I wanted to, yes, sir.

Q. In point of fact, you did contact him or he contacted you? Is that correct?

A. That may be right, but he didn't give me any information of any value, and I wasn't trying to find out what the defense was going to be and didn't know and didn't plan to put him on the stand.

Q. Now, can you tell me if you had any conversations with the prosecution, other than the conversation you had on March 20 with Mr. Foard?

A. Not that I remember. I went to Court early. I just don't know really, but I went to Court early to discuss the case with the solicitor; did discuss it with him.

Q. Do you remember what you said to the solicitor, what the conversation about the case was?

A. I knew pretty well who had been subpoenaed. We had a man to show the damage to the Draft Board that ran up above—I've forgotten whether it was thirteen, fifteen or seventeen hundred dollars; we had people to testify to the amount of damage and what happened, and so forth; and I thought we had a good case without Weatherford. I was satisfied.

Q. Do you recall whether or not you discussed the witnesses which the State would call?

A. No, sir, I didn't.

Q. Did you have any conversation about Mr. Weatherford with Mr. Foard, prior to the trial, on that date of the trial?

A. I wasn't even sure when I called Mr. Weatherford on the telephone that the solicitor was going to call him, but he gave some indication that he might; so that's the reason I called down there to find out where he was going to be, as far as I know.

Q. Is it an unusual or usual thing for an undercover agent to testify at a trial?

A. Well, it depends on what he's doing, and sometimes they testify and sometimes, they don't.

Q. Has it ever happened in your own experience that one of your undercover agents has testified at a trial of someone?

A. I've named undercover agents. I don't know whether we have had any to testify or not.

Q. You can't recall ever having an undercover agent testify other than Mr. Weatherford?

A. Well, of course, many, many, many times on drugs and violations of that type, your undercover people do testify. It's necessary to testify to get a conviction.

Q. So, is your testimony that it's a usual thing for an undercover agent to testify at a trial?

A. Well, at some point in time on all your big cases, drug cases and everything else, you have to let them testify, and then you give them a regular job and give them another assignment.

Q. Are there any standing or informal instructions which are given to those undercover agents to instruct them as to what they ought to do following an arrest but prior to trial?

A. Well, you usually don't make their identity known until you have to.

Q. Your answer is that there are none?

A. You use an undercover man as long as you can, unless you have some specific reason to take him out or his identity becomes known generally.

Q. I understand that, but my question, Mr. Strom, is whether or not—

A. You have to evaluate each agent.

Q. My question is, are there any standing instructions or informal instructions which are given to undercover agents to tell them how they ought to behave following the arrest that they are involved in, until such time as they might testify?

A. Of course, we tell them to be careful.

Q. And that would be all the instructions they would be given?

A. We don't make any suggestions. We've never been interested in a man's strategy or trial or defense or try to find out what his lawyer says. We have no interest whatsoever.

Q. Is your answer to my question that you don't have instructions to give these agents?

A. No, I don't give them instructions of that type.

Q. Do you think they should receive any instructions in that area?

A. I don't see where it would be any benefit to the South Carolina Law Enforcement Division. We don't bring a case until we figure we have enough evidence to get a true bill and obtain a conviction, and I really am not interested in the defense.

Q. Mr. Strom, were you concerned that Mr. Weatherford maintain his cover following Mr. Bursey's arrest?

A. I wasn't concerned, because everybody doing undercover work, occasionally, somebody is going to find out about it and make him—know who they are; no great concern.

Q. It wouldn't have damaged your fact-finding mission to have Mr. Weatherford's cover blown?

A. I didn't give it any thought really. After a man breaks a pretty good-sized case—if it's a safe robbery or whatever it may be—everybody involved, they are going to get together, and they are going to figure out as best they can what happened. They know something has happened or they wouldn't have got caught; so, I figure on a pretty good-sized case, an undercover man, his identity is going to be known anyway.

Q. Well, your answer is that you weren't concerned that any mission of SLED would be jeopardized by his cover being glown?

A. I sort of figured they figured it out, yes, sir.

Q. You did not think that any mission of SLED would be jeopardized by Mr. Weatherford being revealed as an informer?

A. Of course, if he was identified, he naturally couldn't do the things he was doing—isn't no doubt about that—if he wasn't identified. What I'm saying is, most of the time

when you catch a man with an undercover agent, the other people figure out—whether they tell you or not, they at least think they know what happened.

Q. I still don't believe you answered my question, Mr. Strom. Would it have jeopardized any mission of SLED, had Mr. Weatherford's identity been revealed after the arrest?

A. It depends on what he was doing.

Q. You, of course, know what he was doing.

A. I don't know what was going to happen. If he had been generally known, and he was an undercover agent and tried to get in a place, and if he had been known as an undercover SLED agent, he couldn't get in.

Q. Well, would that have jeopardized the mission of the South Carolina Law Enforcement Division?

A. I really didn't put much emphasis on how effective he could be after this anyway.

Q. After the arrest?

A. Yes, sir.

Q. So, you had no reason to want to see his cover remain? Is that it?

A. I wasn't going to announce it in the newspaper, but I wasn't going to be in shock if it—if they made him.

Q. Would it be fair to say that he had served his usefulness as far as SLED was concerned?

A. Well, that's always a question as to how many people would—what they figured out. I really can't—I would like to answer your question but I can't because—

The COURT: Let me ask you the question: Was there anything particularly that Weatherford was working on—

The WITNESS: No, sir.

The COURT: —at the University, where you had to keep his cover for a month, six weeks, two months?

The WITNESSS No, sir.

The COURT: Is that what you want to know Mr. McDonald?

Mr. MCDONALD: Yes, sir.

Q. Now, Mr. Strom, I believe you indicated, in respouse to a question of mine or possibly a question of Mr. Coleman's, that someone other than Mr. Weatherford told

you about the so-called take-over or demonstration of the Administration Building at the University in 1970? Is that correct?

A. That was on the Administration Building. There was so much going on, there were lot of things you could see for yourself. I know I reported to the Governor—he was going out of town—told him that we needed to bring in extra people on stand-by, so we would have sufficient people. I wasn't completely sure they was going to take over the Administration Building that day; however, I did get extra uniformed Patrolmen, extra Highway Patrolmen, extra SLED agents and probably put the National Guard on stand-by, because we later called the National Guard out that day.

Q. Who was the agent who told you about the proposed take-over of the Administration Building?

Mr. COLEMAN: Objection.

A. I can't tell you to save my life.

Q. Was it somebody other than Mr. Weatherford? That's all I care about.

The COURT: Just ask him the question did Weatherford tell him about the proposed take-over of the Administration Building.

The WITNESS: Well, sir, I wasn't definitely sure that it was going to be taken over.

The COURT: Who told you? That's the question? What agent told you?

The WITNESS: I don't know, sir. I can't—I cannot—I don't believe that I really knew for a fact—

The COURT: This was given to you secondhand?

The WITNESS: Yes, sir.

The COURT: Could you trace it to Weatherford?

The WITNESS: Not that I remember, sir.

Q. I don't want you to disclose any names now, but have you had—following Mr. Bursey's trial, did you assign undercover agents to do the things which Mr. Weatherford formerly had done?

A. No, sir, things had cooled off, and it's not necessary for me to have that much information.

Q. So, there's no agent assigned to the University now?

A. No, sir, I keep in touch with the security, the police on campus, and that's all I have.

Mr. MCDONALD: Thank you very much, Mr. Strom.

RE-DIRECT EXAMINATION

By Mr. COLEMAN:

Q. Chief Strom, particularly in the area of unlawful drugs, is it not true that you have many, many undercover agents?

A. Yes, sir.

Q. And is it not almost public knowledge that it's important to keep the cover of an undercover agent protected as long as possible?

A. Yes, sir.

Q. When an undercover agent is involved in each individual arrest, is it not your purpose to maintain that agent's cover if possible?

A. Yes, sir.

Q. In every case?

A. Yes, sir.

Q. Then, it is to the interest of law enforcement and to SLED—

Mr. MCDONALD: Your Honor, that's a little on the leading side.

The COURT: You are making an argument right now, Mr. Coleman. I understand all that. The question is, you've got to balance that worthwhile desire against the Constitutional rights of each individual defendant.

Q. At the time of the arrest, Mr. Strom, and thereafter, did I not understand you to say that Mr. Bursey was still your principal undercover agent at the University of South Carolina?

A. Yes, sir.

Q. Was there any particular circumstance involved in activities in and around the University at that time that called for your particular attention and had there been before that?

A. Well, the campus hadn't quieted off. I mean, there had been a good bit of disorder throughout the country on

college campuses, and I think all the police agencies throughout the country had undercover people as best they could.

Q. At the time of Mr. Bursey's arrest and of Mr. Weatherford's arrest for the Draft Board incident, did you know at that time or did you have reason to believe his cover had been blown at that time?

A. No, sir.

Q. And what was the purpose of maintaining his cover?

A. Well, I wanted him to be there; and if anything else happened, he could tell us about it.

Mr. COLEMAN: Thank you, sir.

The COURT: Anything further? You may come down.

John W. Foard, Jr., first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. COLEMAN:

Q. Mr. Foard, I believe you are the Solicitor or the State's prosecuting attorney for the Fifth Judicial Circuit of South Carolina?

A. That's correct.

Q. That's comprised of Richland and Kershaw Counties?

A. Yes, sir.

Q. State whether or not, Mr. Foard, you were involved in the prosecution of Brett Allen Bursey on March 20, 1970, for an incident arising out of the—some personal property damage to the Draft Board at Columbia?

A. I personally prosecuted that case.

Q. Do you recall when you first knew of the facts in the case, Mr. Foard?

A. The day after it happened one night, I was at SLED headquarters on another matter when this came up.

Q. Did you discuss the matter with Mr. Weatherford then?

A. No, I did not discuss it with him. I believe when—I went out there on another matter, a prior appointment with two other people, and I was fixing to leave, and Chief Strom asked me to wait a minute. I noticed there were

some FBI agents there, and the first I knew about the property damage that had been done was some time that morning. And I don't recall the details, it has been so long ago, but I talked to a young man—I remember that he was a Clemson student, because he was either on his way from the beach through Columbia to Clemson or Clemson to the beach—I've forgotten which—that came out and gave a statement as to what had happened, and that's the only person that could have been a witness that I talked to that day. I talked to the Chief, and I believe I talked to a couple of FBI agents.

Q. Was that about the facts generally or any particular aspects?

A. No, this person told us the entire story.

Q. And thereafter was Brett Bursey indicted along with Jack M. Weatherford?

A. Yes, sir, I believe a warrant was issued that day for malicious mischief to personal property and malicious mischief to real property; it later went to the grand jury; and both of them were indicted.

Q. What, if anything, did you have to do with Mr. Frank Taylor's representation of Mr. Weatherford in this matter?

A. Well, some time after Weatherford had been released on bond, which—I don't recall who at SLED I talked to, but I inquired as to whether or not he had an attorney, and I was told he did not, that he wanted an attorney, and I sent him word to—that I would—at that time, I didn't send him word. I talked to Frank Taylor rather briefly and asked him to represent him, and I sent Mr. Weatherford word to get in touch with Mr. Frank Taylor.

Q. Did you know Mr. Weatherford—did you know at that time that Mr. Weatherford was an undercover agent for SLED?

A. Oh, yes, I knew that.

Q. What was the purpose in your sending him word or sending Mr. Taylor word to—asking him to represent Mr. Weatherford?

A. Well, I didn't want to disclose his identity at that time, and it could have been any number of lawyers. I just

happened to refer him to Mr. Frank Taylor, and I told Mr. Taylor that—we discussed the facts, as I recall. I told him I didn't want anybody, including people in his office, to know that this man had been an undercover agent, and that I would have him to get in touch with him. I understand he did later get in touch with him.

Q. Was that for the purpose of preserving Mr. Weatherford's identity generally?

A. Yes.

Q. Did you ever talk to Jack Weatherford prior to the morning of the trial, March 20, 1970?

A. Not about the case.

Q. Did you ever talk to Mr. Frank Taylor about any conversation that he might have had with anyone about the case?

A. No. The only discussion I had with Frank Taylor was that he agreed to represent him. We may have mentioned it, but I never discussed the facts with him. There was no need to.

Q. At what point did you make the determination to use Jack M. Weatherford as a witness in the Bursey prosecution?

A. I had debated it in my mind for some time. If you want to get real down to the actual time that I made up my mind, was probably fifteen or twenty minutes—I'm not sure of the exact time, but I think I made up my mind definitely probably while we were picking the jury. I was debating—I had a lot of reasons to do it; a lot of reasons not to use him.

Q. Was one of those reasons his activities as an undercover agent generally?

A. Well, I had two reasons. I'm not sure I knew everything he was doing, but I knew that he had been and could continue to be important in giving information of—we had had lot of trouble with threats to blow up buildings and things, and I knew that perhaps he could still be valuable. I also was afraid that if he testified, that his life could be endangered. Those were the two things that bothered me about using him.

Q. Did you ever at any time receive any information from or reportedly coming from Jack Weatherford with reference to Mr. Bursey's defense?

A. No, I never discussed his defense with anyone. I didn't know what his defense was. I didn't care what his defense would be. Frank Taylor certainly didn't discuss it. I didn't know until after this suit came up that his attorney had—or what conversations, if any, they had together.

Q. You did not know until after the trial that Mr. Wise had had any conversation with Mr. Taylor?

A. I didn't know until after the trial that Mr. Weatherford had met with Bursey's attorney.

Q. Did you know that Mr. Wise had any conversation whatever with Mr. James Spruill, III?

A. No, in fact, the first I heard of his name, you recall you asked me to come down in a conference last week about the case, and the first time I knew that they even knew each other was one day last week.

Q. Then the decision to use Mr. Weatherford as a witness was entirely your decision and was not made before the morning of March 20, 1970?

A. That's correct.

CROSS EXAMINATION

By Mr. BUHL:

Q. Mr. Foard, was Jack Weatherford indicted for the crimes that you described earlier?

A. Yes, sir, as I have already testified to, he was indicted by the grand jury.

Q. And they were *nol-prossed* by your office, I believe?

A. I don't know what you mean by "they."

Q. The charges?

A. There was only one indictment; and after the trial, his case was dismissed.

Q. Okay. I believe you testified that you were at SLED headquarters on the morning of the 20th of March?

A. I don't recall the date but the—

Q. Day after the break-in?

A. I said the day after the night it happened, I was there.

Q. Did you have a conversation with Mr. Strom that morning that indicated whether there was an agent at that time? When was the first time you became aware that he was indeed an agent, undercover agent?

A. That Mr. Weatherford was?

Q. Yes, sir.

A. I had known that a long time.

The Court: You knew Strom had an agent on the campus whose name was "Weatherford" before this happened?

The WITNESS: Yes. Oh, yes, I knew that.

Q. You said the consideration when you desired to call Mr. Weatherford as a witness, you considered—you feared for his life. Were there specific threats you knew about?

A. What's that?

Q. Were there specific threats upon Mr. Weatherford's life that you knew about?

A. I didn't say that, no.

Q. I thought you said one of your considerations in whether to call him—

A. I said one of my considerations was that I was afraid that once his identity became known, that his life could be in jeopardy. You have to bear in mind that he had investigated a lot of things involving a lot of people.

Q. Okay. On the morning of the 20th or the day after the break-in, did you discuss the possibility of Weatherford's being called to trial with Mr. Strom? Did you go into it?

A. Well, I don't know how to answer that question, it's so general. After we had finished some business with some other people that had nothing to do with this case, Mr. Strom asked me to wait a few minutes, and I did. In fact, I noticed two FBI men; I spoke to them, and I don't know how long it was. I was brought in, and I don't know who first told me about the incident at the Draft Board; but some time later in the morning, the—this young student was brought in, and I don't know whether his statement was reduced to writing or not, but I listened to him; and after listening to him and conferring with Mr. Strom and the FBI and other people, I went back and directed to

someone a warrant, which arrested both of these people—resulted in their arrest.

Q. That was Mr. Weatherford and Mr. Bursey?

A. That's right.

Q. Was that Mr. Billy Finney that you talked to at SLED?

A. It could have been. I don't recall the name.

Q. When did you notify Mr. Strom that you had decided to go ahead and call Mr. Weatherford as your witness?

A. I didn't exactly notify him. At the morning of the trial—I don't know, 30 minutes, 40 minutes or some time, some time before Court started, I asked the Chief where was Weatherford, and I don't know whether he knew or had to call or what, but I asked him this: I said, "I'm inclined to use him, but I'm not sure. I want you, if you can get him, to bring him up here to my office. Ask him one question, is he willing to testify. If he says, "No,' I will not use him; if he says, 'Yes,' I will use him, maybe."

Q. That's the first time you talked to Weatherford about the case?

A. I didn't talk to Weatherford about it when he came there. He came into my office on the second floor. At that time, I had a real small office, which was up there on the second floor. He came in; I spoke to him; I probably shook hands. I said, "I'll let you know something in a little bit." Then later, we go into the courtroom; the case was called; I think some motions were made; we picked the jury. All right, after we picked the jury and they were sworn, that's when I really made up my mind. I turned to the Chief. I said, "Chief, while I read the indictment to the jury, ask Mr. Weatherford to come in."

Q. Could you shed some light on why Mr. Merrick was not indicted with Mr. Bursey and Mr. Weatherford?

A. These names are confusing to me. There were some more or less informers involved. I'm not sure even who they worked for; for example, there was one who—when the case was called for trial—was out of the country. I don't know whether he ever worked for SLED or not. There was a policeman who I worked with rather closely who is not

connected with SLED, informed me that he was out of the country. I'm not sure who he was an informer for. During that period of time, there was a threat of blowing up buildings in this city. There were informers working for the FBI; informers working for this agency; and I'm not sure that I know who was who.

Q. Did you have any other proof at that time to place Mr. Bursey at the scene of the crime, except for Mr. Weatherford's testimony?

A. I thought I had very good evidence to get to the jury and very good chance of conviction without the use of Mr. Weatherford.

Q. Was there anyone else, an eyewitness, for example, who could have placed him at the scene?

A. I can't recall now whether I had some witness I didn't put up or not. It's very hard for me to recall that, but—I just don't remember whether I had other evidence I could have put up or not.

Q. You say you are not sure whether Greg Merrick was indeed an informer for some other agency besides SLED?

A. No, I'm not sure. I just don't remember. I mean, these are a lot of names. I know that from time to time, I have dealt with so many law enforcement agencies and so many informers that I wouldn't want to say without—

Q. According to the testimony of Mr. Weatherford and Mr. Bursey, Mr. Merrick was present at the scene. Is that not correct?

A. I don't remember. You've got the record there; whatever it says. I try so many cases, I cannot remember names. I know that Mr. Weatherford was not the only person there that was working for some agency.

Mr. BUHL: We have no furhter questions.

Mr. COLEMAN: I have none.

The COURT: You may come down. Let's take a short recess.

(4:10 p. m., recess.)

(After recess.)

Frank L. Taylor, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. COLEMAN:

Q. Mr. Taylor, you are, I believe, a practicing attorney in Columbia and have been so for many years?

A. Yes, sir.

Q. You have been here throughout the preceding testimony in this case, have you not?

A. I have heard most of it.

Q. You did, I believe, undertake the representation of Jack M. Weatherford in the matter arising out of the Draft Board incident?

A. That's correct.

Q. Would you tell us how that came about, please, and what happened thereafter?

A. Well, it's been a number of years. As best I recall, Solicitor Foard, who had been a long personal friend of mine, called me one day and told me he wanted to ask me to do him a favor. I told him I would before I knew what it was he wanted; and he asked me if a boy named "Weatherford" came to see me—asked me to agree to represent him. I told him I would. I heard his testimony, but I don't remember that his conversation with me was quite as detailed as he stated it.

Q. Are you speaking of Mr. Wise's testimony?

A. No, I'm talking about Mr. Foard's.

Q. Mr. Foard's testimony?

A. I think all he asked me to do was to do him a favor and told me if this boy came and asked me to represent him to do it and added that "He works for SLED." I don't know that I had the impression from talking to Mr. Foard on the phone that Mr. Weatherford was involved in any alleged crime at the time.

Q. Did you thereafter—

A. I don't have that impression now; no recollection of that.

Q. Did you thereafter talk with or see Mr. Weatherford?

A. Yes, Mr. Weatherford came to see me. I don't know on dates how long it was after the conversation, nor can I recall Mr. Weatherford telling me that he was involved—that he was an undercover man at the time the alleged crime was committed.

Q. Do you recall whether or not you had a conversation with Jack M. Weatherford about the facts of the case?

A. Yes, briefly and really, the impression I had from talking to him mainly was that he was interested in me helping him get his brother's time reduced. He discussed that with me, I believe, more than he did the facts in this case.

Q. Did you thereafter, after this particular occasion when you had some discussion with Jack Weatherford, did you thereafter have any conversation with Weatherford before the trial?

A. No, that's the only time I discussed it with him. I never did discuss it with anybody at SLED. The next recollection I have of anything transpiring in this case at all, Mr. Spruill, who was in the Law School still, Mr. James Spruill, Jr.,—

Q. James Spruill, III?

A. Yes, the third, really, it is—I think he calls himself the third, but I think really he is junior—I think his grandfather is dead, so I believe he's junior—anyway, I remember him one day telling me he had a good friend, Mr. Wise, a lawyer, that said, "You and he have got a case together." I said, "What kind of case have we got together?" As I recall it, he said, "Brett Bursey's case." And we sort of made sort of a joke out of it, and we didn't discuss the facts in any particular at all, and I associated that conversation with Weatherford having been to see me.

Q. Prior to the time Jim Spruill told you you were in a case involving Mr. Bursey—

A. Yes, sir.

Q. Had you informed Mr. Spruill you were representing Mr. Weatherford?

A. No, I didn't discuss it with anybody.

Q. State whether or not you discussed the case with Mr. Rauch Wise?

A. I have a very faint recollection of him coming to my office. I know he and Mr. Spruill were friends. I have heard him discuss Mr. Wise, and as I recall, I was coming in one day when our office was at 1223 Washington Street, on the second floor, and I think the three of us were in a little hallway—you have been in my old office, you know how it was arranged—and I think we talked briefly. I heard Mr. Wise's testimony wherein he said that I told him I didn't know who the undercover agent was. I have no recollection of discussing undercover agent with him. I believe at the time he discussed the case with me, he knew his client was going to be tried separately, and we didn't discuss any factual situation in it or anything that I can recall. I didn't go to any preliminary hearing; I hadn't talked to Mr. Weatherford since he had come to my office at one time and we had a very brief conversation. Most of the conversation, as I recall it, had to do with some trouble his brother was in.

Q. Did you at any time discuss with Mr. Foard any information that had been obtained by Mr. Weatherford?

A. We didn't ever discuss it any more to my recollection, except one time on the phone when he called and asked me if Mr. Weatherford came in, to agree to represent him. And then the day, I suppose, the trial took place, one of my secretaries told me they wanted me in the courtroom on the Weatherford case; and I went over to the courtroom and walked in the door. As I walked in the door, Mr. Foard came over to where I was standing, right opposite the grand jury box, as I recall it, and told me I wouldn't be needed. I hadn't helped prepare the trial; I hadn't discussed it with him; and I hadn't discussed it with anybody except whatever conversation I had with Mr. Wise. I don't recall he and I discussing anything about who the informer was in the case, because I didn't know there was an informer in the case.

Q. Did you at any time discuss the facts of the case with any police authorities?

A. Did I do what?

Q. Discuss the Bursey case with any police authorities?

A. None.

Q. Would it be fair to say that your representation of Mr. Weatherford in this case was merely for the purpose of preserving his identity as an undercover agent?

A. Well, I couldn't quite say that, Mr. Coleman. I thought pretty quick when he came to see me that what he was wanting to use me for, I had promised to do Mr. Foard a favor, and he was wanting to use me to help get his brother—he was serving a sentence of six or eight years, as I recall; he hadn't served the one-third term so he would be eligible for parole; and I expected him to come back and discuss that matter with me, and he never did come back.

Q. You saw him then only the one time prior to trial?

A. Just one time, yes.

CROSS EXAMINATION

By Mr. BUHL:

Q. Mr. Taylor, you do a good bit of criminal representation? Is that not correct?

A. Well, probably about ten percent of my practice; maybe fifteen percent.

Q. Would you have agreed to represent Mr. Weatherford in here in this case today if you had known that his visit to you was merely to establish a cover as an agent?

A. No. As I say again, Mr. Foard asked me to do him a favor, and Mr. Foard and I are very close friends, and I said, "Yes," before I knew what it was he wanted. He didn't explain the details. He said, "We'll talk about it later." And the thing had gone on and on, and to tell you the truth, I had about forgotten about it. When I had a call and my secretary told me I was wanted in the courtroom on the Weatherford case, I had to think a little bit to think what it was.

Q. You said you were retained. Was—

A. I wasn't paid any money; I wasn't expecting any money and—

Q. Just a personal favor?

A. That's right.

Q. And it's your recollection that when you talked to Mr. Weatherford, the thing that he discussed with you was the situation with his brother? Is that correct?

A. Of course, you know, you see things in the paper, and it's been four or five years ago, and the Bursey name along about then was a name seen in the paper a lot and had something to do with the Draft Board or—we didn't go into any details much in the case, as I recall it. Maybe Mr. Weatherford will remember more about it than I did, but I think our conversation was real short on—the whole conversation we had, I think, was just a very brief conversation.

Q. You did discuss some of the facts involved?

A. I remember it had to do with red paint and a brick through the glass. I remember that much.

Q. Did he tell you at that time that he was an undercover agent for SLED?

A. I have no recollection that he told me he was, no. Mr. Foard had told me at the time he called me that this boy was working for SLED, but I didn't—as I recall it, I didn't interpret that to mean he was an undercover agent at the time this alleged offense was committed.

Q. Okay. You met with him on one occasion and discussed the facts in the case. Do you remember whether that was during the week or was it a special meeting on a weekend?

A. He tells me awhile ago it was on Saturday morning, but it's a real rare occasion for a number of years that I've gone to the office on Saturday morning, and somehow I would question his recollection about it, but I don't remember going on this special day to see him.

Q. Okay. Did you make the decision to sever the trial of the cases?

A. Well, I don't remember ever discussing that, except I would have thought—I mean, I would have thought that his chances for acquittal would have been better, being tried by himself, and it's possible that somewhere down the line I could have mentioned that to someone, but I made no motion about it. I have never presented any brief to any Court on it, and I didn't ask for a preliminary hearing. I

didn't know a preliminary hearing was being held in it, as far as I can recall.

Q. Okay.

A. Nobody has ever discussed with me or—to get any permission from me to talk to Mr. Weatherford. I have no recollection on that.

Q. You did not request a preliminary hearing at that time?

A. No. No. I have no recollection of that.

Mr. BUHL: Just one second. We have no further questions.

The COURT: Mr. Taylor, when you received the second call from Solicitor Foard or his office, telling you to come to the Courthouse in connection with the Weatherford matter, did you think you were going over there and try the case?

The WITNESS: Well, I was afraid that's what I was going to do, yes, try a case. And I remember cussing all the way to the Courthouse. I hadn't been paid the fee, and that's the last that happened, what I have enumerated to Your Honor.

The COURT: Well, you just met with Mr. Weatherford one time?

The WITNESS: One time, yes, sir.

The COURT: Did he tell you he was under indictment?

The WITNESS: Well, I knew he was—I knew he was out on bond. He had been released on bond, and I heard the testimony of—that some professor had said he had employed me. I haven't talked to any professor about it, and nobody—other than Mr. Foard, if you call that employment, that was it.

The COURT: All right. Any further questions? You may come down.

James A. Spruill, III, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. COLEMAN:

Q. Mr. Spruill, I believe you are a practicing attorney of the Bar of South Carolina?

A. Yes, sir.

Q. Practicing now in Cheraw?

A. Yes, sir.

Q. You have heard the previous testimony in this case?

A. The majority of it, sir.

Q. In 1970, at or about the time Mr. Weatherford was being represented by Mr. Taylor, what was your position with Mr. Taylor's firm?

A. I was law clerk in his office.

Q. You were not an attorney at that time?

A. No, sir.

Q. Do you recall having a conversation with anyone about the Bursey case, the Weatherford case, whatever you might call it?

A. I recall generally, Mr. Coleman, that Mr. Wise and I were friends, we had been in Law School together and worked on the *Law Review*, and he had finished the summer before this spring that this took place; and I recall when he came to town, he would stop by and see us or I would see him in the Courthouse or something, and I recall that he told me that he was representing Mr. Bursey, and that Lawyer Taylor was representing the—Jack Weatherford—Mr. Weatherford.

Q. Did you know prior to that time that Mr. Taylor was representing Mr. Weatherford?

A. No, sir, I didn't.

Q. Did not?

A. Did not.

Q. I gather then that any conversation you had with Mr. Wise was on a personal friendship basis?

A. Yes, sir, and I never represented to Mr. Wise that I knew anything about the case, either Mr. Weatherford's case or Mr. Bursey's case; and Mr. Wise never gave me any specific information about the case, other than what you read in the newspaper. I think that he said that there was —that they suspected there was an informer, because without the informer, that the case against Mr. Bursey wasn't strong.

Q. Did you at any time, Mr. Spruill, participate in a conference between Mr. Wise and Mr. Taylor and yourself with reference to the Bursey case or the Weatherford case?

A. No, sir. I think I introduced Mr. Wise to Lawyer Taylor in the hall in front of his office, and I think that I went back into Pete Martin's office, which was right there.

Q. You did not go in and participate?

A. No, sir, I did not.

Q. Do you know how long this conference lasted?

A. My recollection is that Mr. Wise—I think he had been up there looking for Lawyer Taylor two or three times before and Mr. Taylor hadn't been there, and I think he stopped back by very shortly.

Q. Very shortly?

A. Yes, sir.

Q. By that you mean—

A. Within a period of five minutes, and I asked him—I think I remember asking him what Lawyer Taylor had said, and that he said that—I gathered, nothing; that he had given him no information.

Q. That Mr. Taylor had given him no information?

A. Yes, sir.

Q. Did you gather that there had been any serious discussion of the case?

A. That was not my impression of Mr. Wise's remarks. I understood that there had been no serious discussion.

Mr. COLEMAN: Your witness.

CROSS EXAMINATION

By Mr. BUHL:

Q. Following your conversation with Mr. Wise and your introduction of Mr. Wise to Mr. Taylor, did you talk to Mr. Taylor about the case at all?

A. No, sir, not in any detail about the case.

Q. After talking to Mr. Wise, did you relay to Mr. Taylor what the case was about?

A. No, sir.

Q. Or whether he wanted you to work on it?

A. No, sir. There were a good many things in the office that I did not have anything to do with. That was not at all unusual. There were four lawyers up there at the time, and I believe I was the only law clerk, and I did exactly what people asked me to, and the fact that there was a case

in the office wouldn't mean that I would have known something about it or have expected to know something about it.

Q. Mr. Taylor didn't ask you to work on it at all?

A. No, sir, he didn't. Mr. Taylor never discussed the case with me at all.

Q. Did you have subsequent conversation with Mr. Wise about the case?

A. If I saw him again before the trial, I very probably did, but just in the nature of telling him "Good luck," really.

Q. Were you present at the trial at all?

A. No, sir.

Mr. BUHL: We have no further questions.

RE-DIRECT EXAMINATION

By Mr. COLEMAN:

Q. Mr. Spruill, did you ever impart any information to anyone—

A. No—

Q. —about trial strategy of the Bursey—attorney—client—

A. No, sir, and I would have had no information to impart.

Mr. COLEMAN: Thank you. Nothing further.

Mr. COLEM: Lt. Ronald W. Cook.

Lt. Ronald William Cook, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. COLEMAN:

Q. Mr. Cook, I believe you are a lieutenant with the South Carolina Law Enforcement Division?

A. Yes, sir, I am.

Q. And did you occupy that position in 1970, during the periods about which this case—about which this testimony has been?

A. Yes, sir.

Q. What was your relations with Jack M. Weatherford during that period of time?

A. Well, I have known Jack for some number of years. I had also known his family, and I was assigned to the Nar-

cotics and Vice Section of our Division, and I was on the streets a good bit at night, and I had occasion to meet Jack and work with him, and he assisted me in doing some undercover work on several different cases and occasions, in conjunction with Mr. Thomas E. Clark, who has previously been referred to as "Sonny" Clark, a deputy with the Richland County Sheriff's Department. After several months of working with Jack in this capacity, we were very much impressed with his talents and abilities, and we took him out to SLED and introduced him to Chief Strom, who placed him on the payroll; and thereafter, Mr. Weatherford would continue to assist me in different types of investigations, narcotics mainly. We traveled over the State on several different assignments, and due to the fact that my being on the streets at night and at various different times and was pretty well accessible, Mr. Weatherford normally contacted me and used me as his contact at SLED, when he had information to relay to the Chief or to SLED.

Q. To your knowledge, was Mr. Weatherford involved in other things than the surveillance of Bursey?

A. Definitely, yes, sir, that was more or less an incidental thing to his being employed at SLED. By virtue of him being a student at the University, he was at the UFO Coffe House and was exposed to the group, AWARE, and I think that's where he first became acquainted with Mr. Bursey, was either at the UFO Coffee House or by attending the meetings of AWARE at the University; and therefore, he was exposed to Mr. Bursey, and, of course, he started giving us some information relative to him.

Q. Did Mr. Weatherford's activities as an undercover agent of SLED take him to other parts of the State than Richland County?

A. Yes, sir, he traveled over the State in my presence, along with me, assisting me with investigations.

Q. Were those matters connected with Mr. Bursey?

A. None whatsoever.

Q. Do you know whether or not Mr. Weatherford was of any value to SLED as an undercover against after his arrest following the Draft Board incident?

A. Yes, sir, he was. He continued to work and was of great assistance to us up until the time of his exposure during the trial of Mr. Bursey.

Q. Did Mr. Weatherford ever discuss with you in any detail whatever any information relative to any attorney-client relationship between Mr. Bursey and Mr. Wise?

A. No, sir, he did not.

Q. Did he ever discuss the trial of the case at all with you?

A. No, sir, he didn't.

Mr. COLEMAN: Thank you. Your witness.

CROSS EXAMINATION

By Mr. MCDONALD:

Q. Mr. Cook, how long have you been an agent with SLED?

A. Since the first of July, 1969.

Q. And you say you and Mr. Clark took Mr. Weatherford to Mr. Strom and were responsible in securing Mr. Weatherford's employment with SLED?

A. Yes, sir, I did.

Q. Were you present at that job interview, if that's an accurate description of the meeting you set up between Mr. Strom and Mr. Weatherford?

A. No, sir, Mr. Clark and I carried Mr. Weatherford to headquarters, introduced him to the Chief, and we left them in the office to discuss matters pertaining to each other privately.

Q. Do you know if it was following that meeting that Mr. Weatherford was hired or was it after that?

A. I'm not real sure. Chief Strom usually handles hiring and firing procedures at SLED, and I don't get involved in them.

Q. You stated that Mr. Weatherford on occasion made reports to you? Is that correct?

A. He made contact with me and gave me certain information.

Q. Do you know whether or not he made similar contact with Mr. Strom?

A. I can't say of my own knowledge he definitely did. I feel sure he did.

Q. You have no knowledge of whether he did or not?

A. No, sir.

Q. Now, you had contact with Mr. Weatherford, I believe you testified, prior to Bursey's arrest? Is that correct?

A. I don't understand what you mean.

Q. You stated that you had some official dealings with Mr. Weatherford, the two of you would go on trips, and so forth, across the State, and that you worked in narcotics and that sort of thing together. Was this prior to Mr. Bursey's arrest?

A. Yes, sir.

Q. What about after Mr. Bursey's arrest?

A. Yes, sir.

Q. Can you describe the extent of your contact with Mr. Weatherford after Mr. Bursey's arrest?

A. Well, Jack and I had—I say, "Jack," Mr. Weatherford—had established a close personal friendship, and I made contact with him on several occasions just out of pure personal type incidents, and one particular incident that stands out vivid in my mind is we went to Myrtle Beach after this—

Q. After when?

A. —and he did some undercover work at Myrtle Beach. After Mr. Bursey's arrest.

Q. How long were you at Myrtle Beach?

A. To the best of my recollection, it was over a weekend, like Friday afternoon to Sunday afternoon, something of this nature.

Q. Did the two of you ever discuss Mr. Bursey following Mr. Bursey's arrest?

A. Not to my knowledge. It was more or less a closed issue. He had been arrested and that was it.

Q. You never discussed Brett Bursey at all?

A. Well, I'm sure he was mentioned, but there was no in-depth discussion pertaining to Brett.

Q. In what context was he mentioned? Do you recall?

A. No, I don't.

Q. Did you ever discuss the possibility of Mr. Weatherford testifying at Mr. Bursey's trial?

A. No, sir.

Q. Did you ever reflect on that yourself?

A. What do you mean by "reflect upon"?

Q. Did you ever tell yourself, "Bursey is going to be in for a shock when his case comes to trial"?

A. No, sir.

Q. That never crossed your mind?

A. No, sir. Actually that case—I was not involved in it. That was Lt. Powell's case and I was out of town during that time, and I didn't have any involvement in that particular case whatsoever.

Q. But you had contact with the man who was centrally involved following the arrest?

A. Yes, sir.

Q. Did SLED have any particular interest in Mr. Bursey?

A. What do you mean, "particular interest"?

The COURT: Were you out to get him? Isn't that what you want to know?

Mr. MCDONALD: In essence, yes, sir. Did they follow him, detail people to investigate his comings and goings; was he the subject of any SLED interests?

The WITNESS: No, sir, not in the context we were out to get him.

Q. Well, in any other context?

A. I don't particularly understand what you mean by this.

Q. Did you have any experience with Mr. Bursey in connection with investigating crimes, stopping him, charging him with things or arresting him?

A. I did some background investigation on him, yes, sir.

Q. In connection with what?

A. In connection with his radical activities.

Q. What was the extent of the investigation that you conducted?

A. I "surveil[ed]" him on occasion.

Q. How often? When? Where?

A. Well, there was no particular pattern or procedure. It was just a hither-there type situation.

Q. When did you start keeping him under surveillance?

A. Gosh, I don't remember. I really couldn't pinpoint a particular date.

Q. Who told you to put him under surveillance?

A. I don't think anyone told me to put him under surveillance.

Q. Why did you put him under surveillance?

A. Because of my interest in him.

Q. And how did you develop an interest in him?

A. He was known to be involved in different incidents.

Q. What were you attempting to discover when you were putting him under surveillance?

A. Nothing particularly. He had been involved in several incidents, and we were just interested in him. He had been known to be charged with offenses against the law, and that's part of our job, is to know what people are doing who have been charged with offenses against the law.

Q. Are you speaking now of his having been charged with the demonstration at the Draft Board?

A. No, no, this was prior to that.

Q. Did you continue to exercise surveillance over him following his arrest?

A. Not to my knowledge.

Q. Did anybody participate with you in this surveillance activity?

A. Well, on occasion there were other agents who were working with me who were in my company.

Q. Were there occasions when those agents would conduct surveillance when you weren't there, or do you have any knowledge of that?

A. That's beyond my knowledge. I can't speak for what the other agents did.

Q. Did you have occasion to see any official reports, which would indicate that people other than you had been conducting surveillance of Mr. Bursey?

A. No, sir.

Q. Do you keep records, Mr. Cook, when you exercise surveillance or investigate somebody as you investigated Mr. Bursey?

A. No, sir.

Q. Is that a usual thing, for agents not to keep records of what they do?

A. When you say "usual," I don't understand what you mean "usual." We keep our personal notes on some things; some things, we don't make notes on.

Q. Are you required in the usual discharge of your law enforcement duties, which I take it are fact-finding, as defined by Mr. Strom—is it usual to keep notes of what you do? Do you keep a day-timer, saying that "From nine to ten, I did this particular thing and answered this particular call"? Do you keep a record of that, sort of log?

A. Not in that detail.

Q. Do you keep it in any detail?

A. No, sir.

Q. You don't keep a record at all of what you do with your time as an agent?

A. Not minute for minute, we don't.

Q. Well, do you keep any records at all?

A. I don't understand what you mean by records.

The COURT: Do you keep any records of who you have under surveillance if they don't do anything while you are watching them?

The WITNESS: No, sir.

The COURT: Do you keep records if you do see them do something that indicates they might be violating the law or getting ready to violate the law?

The WITNESS: On some occasions, we do submit a written report to Chief Strom.

Q. Explain the occasions under which you would do that.

A. Well, that could cover—

The COURT: Just give an example. That's what he wants.

A. Well, if we were surveiling someone who may be prone to commit a safe robbery or something of this nature,

if we saw them in an industrial area at night, where he would ordinarily not have any business at that hour of the night, we would make a note of it and submit it to the Chief, because this could establish probable cause later on in a criminal proceeding against that individual.

Q. Did you ever observe Mr. Bursey commit any crimes during the time that he was under your surveillance?

A. No, sir. If I had, I would have arrested him.

Q. Where did you conduct your surveillance; that is to say, would it be at his house, for example?

A. Yes, sir.

Q. And you did watch his house?

A. On occasion, yes, sir.

Q. Did you take notes of who came in and who went out?

A. On occasion.

Q. What did you do with those notes?

A. Normally, I destroy them.

Q. Did you destroy those notes?

A. Yes, sir.

Q. Where else did you conduct surveillance of him?

A. Well, there were several different places we conducted surveillance of him.

Q. Where?

A. At the UFO Coffee House, at the University.

Q. Did you take notes of who he was seeing and talking with in the UFO Coffee House?

A. No, sir, Mr. Bursey was quite a busy man. That would have—

Q. You spent most of your time trailing him?

A. I didn't say that.

Q. What else did you do besides conduct surveillance? Did you try to talk to people about Mr. Bursey, to find out what he was up to?

A. Not really.

Q. Did you do anything other than just simply watch him?

A. No, sir.

Q. Didn't talk to anybody about what his habits might be?

A. Not to my recollections.

Q. Prior to his arrest, did you talk to Mr. Weatherford about him?

A. No, sir. My interest in Mr. Weatherford was in assisting me in narcotics investigations.

Q. Mr. Cook, did you participate in Mr. Bursey's arrest on March 20?

A. Yes, sir, I did.

Q. How did you happen to be involved in that?

A. I was assisting Lt. Windham, who was the officer in charge of that particular assignment, and we received information—Lt. Windham received information that Mr. Bursey was at the Russell House, at the University. We proceeded to the University, where I identified Mr. Bursey and he was arrested.

Q. Mr. Windham couldn't identify him?

A. I don't know whether he could or could not have. I can't speak for Mr. Windham.

Q. Did he ask you if you could identify him and to do so?

A. No, sir.

Q. Why did you identify him? Were you in charge of the arrest or was Mr. Windham?

A. No, Lt. Windham was the senior officer.

Q. Did you point Mr. Bursey out to Mr. Windham?

A. No, sir, the best of my recollection, when we located the room in which he was in, I went in and identified myself to Mr. Bursey and Mr. Weatherford and arrested both of them.

Q. Did you ever have occasion to search Mr. Bursey's house?

A. No, sir.

Q. Did you ever participate in any police activity which resulted in the search of his house?

A. Not to my knowledge.

Q. Based on your surveillance of Mr. Bursey, you were never able to uncover that he was engaged in any illegal activity?

A. Not any illegal activities that were committed in my presence.

Q. Your answer is "Yes" to my question?

The COURT: I think he answered it properly. He said it wasn't committed in his presence.

Q. Well, did any investigations of yours lead to the conviction of Mr. Bursey in any context?

A. It could have contributed to—

Q. I'm asking you if you know of—

A. I don't know that of my own knowledge.

Q. —any use your surveillance was put to that led to the conviction of Mr. Bursey?

A. I can't say "Yes" or "No." All I can say is that it could have contributed.

Q. Well, you know what you know. Do you know of any use which anything that you gathered, any information you collected about Mr. Bursey—do you have any knowledge of that information which led to his conviction?

A. I can't say. I was not the jury that convicted him. All I can say is that possibly some of my information could have been used.

Q. My question is, do you have any personal knowledge that anything you discovered about Mr. Bursey was the foundation for criminal conviction?

A. I can't say that of my knowledge, no, sir.

Mr. MCDONALD: Thank you, sir.

Mr. COLEMAN: I have nothing further.

The COURT: You may come down.

Mr. COLEMAN: That's all our witnesses, save—

The COURT: All right. You are going to put up the defendant Weatherford next?

Mr. COLEMAN: Yes, sir.

The COURT: I assume that will take a while.

Mr. COLEMAN: Yes, sir.

(Discussion)

(Witness Strom excused, without objection.)

(Further discussion)

(Deposition, J. P. Strom, received into evidence as Plaintiff's Exhibit 3.)

(Transcript of General Sessions Court Trial, July 27, 1970, received into evidence as Plaintiff's Exhibit 4.)

(Weatherford deposition received into evidence as Plaintiff's Exhibit 5.)

(5:15 p. m., Court recessed, to resume at 11 a.m.—for this case—the following day.)

June 11, 1974

Columbia, South Carolina

(11 a. m., trial resumed.)

(Parties announced ready to proceed.)

Jack McIver Weatherford, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. COLEMAN:

Q. You are Jack M. Weatherford, one of the defendants in this case?

A. Yes, sir.

Q. Mr. Weatherford, you have been present during the—all the preceding testimony in this matter, have you not?

A. Yes, sir.

Q. Where have you been, Mr. Weatherford, since you left Columbia after the trial in March, 1970?

A. I stayed here for two years at the University and then I went to California.

Q. Are you in school there or something?

A. Yes, sir, I'm at the University of California.

Q. Are you going to be back there when you leave here after this trial immediately?

A. No, sir.

Q. Where will you be?

A. I'm going to go abroad to study for awhile.

Q. How long will you be abroad?

A. Initially, for about four months; and then for a year.

Q. Your studies are leading towards what?

A. A. Ph.D. in Anthropology.

Q. You plan to be a teacher or what?

A. Yes, sir.

Q. How old are you, Mr. Weatherford?

A. Twenty-seven.

Q. Are you married?

A. Yes, sir.

Q. Any children?

A. Two.

Q. Mr. Weatherford, since you have heard the preceding testimony, I see no point in going back into it. You do recall, I am sure, the incident at the Draft Board on March 20, 1970?

A. Yes, sir.

Q. Had you made any contact either verbal or in writing to SLED or any other police officer prior to the break-in?

A. Yes, sir.

Q. What was the nature of that contact?

A. On the date of the break-in, I phoned in, and I believe I talked to Mr. Clark, Thomas Clark, but it might have been to Ronnie Cook, who was in here yesterday. I'm not sure which one.

Q. Either SLED Agent Cook or Richland County Deputy Sheriff Clark?

A. Yes, sir.

Q. What was the purpose of that report?

A. To get word of the break-in into the people at SLED.

Q. You did thereafter participate in the break-in?

A. Yes, sir.

Q. After the break-in, what, if any, contact did you make with any police officers with regard to the incident?

A. I waited until after daybreak the next morning and I phoned in back into SLED again.

Q. What was the purpose of that contact?

A. To make arrangements for the arrest of Mr. Bursey.

Q. And then you were there at the arrest with Mr. Bursey?

A. Yes, sir, that's correct.

Q. Did you ever at any time make any written report to SLED about this particular matter?

A. No, sir, I did not.

Q. After your arrest, along with Brett Allen Bursey, what, if any, contact did you have with SLED or any other police officer with regard to this particular matter?

A. With regard to this matter, we didn't have any further contact until the time of the trial.

Q. There was testimony that you visited Mr. Frank L. Taylor, a Columbia attorney. Do you recall that incident?

A. Yes, sir.

Q. Upon whose instructions did you visit Mr. Taylor?

A. Someone had made the arrangements. I think Mr. Foard testified that he made the arrangements; and someone called me—I think it was a secretary who called me and notified me that an appointment had been set up.

Q. Did you go and see Mr. Taylor?

A. Yes, sir, I did.

Q. What occurred then?

A. We talked for ten or fifteen minutes, and he said he knew about the case, and that there was no need to discuss it. He just wanted to see what I looked like and find out a little bit about me, so he would recognize me if he saw me again, and that was the extent of our conversation.

Q. Did you get the impression that Mr. Taylor knew or felt at that time that his representation of you was purely technical?

A. Yes, sir.

Q. Do you recall the extent to which you and Mr. Taylor discussed the details of this case—of the break-in?

A. We really didn't discuss it at all. He said that he didn't care to go into the matter. He just mainly wanted to know who I was.

Q. Was Mr. Spruill or anyone else present at that conference?

A. No, sir, there was no one else present.

Q. Thereafter, did you see Mr. Taylor upon any occasions prior to the date of the trial?

A. No, sir, I did not.

Q. There's been testimony that there was a meeting involving Attorney Rauch Wise, Mr. Bursey and you at Mr. Bursey's house, not too long after Mr. Bursey was released from jail on bond. Do you recall such a meeting?

A. I saw Mr. Bursey and Mr. Wise several times between the trial, and I remember that I had seen them out at Mr. Bursey's house, but I don't recall any particular meeting that was set up between us.

Q. So far as you know, was there any prearranged or scheduled meetings at Mr. Bursey's house at any time, involving you, Mr. Wise and Mr. Bursey?

A. No, sir.

Q. You said, I believe, that you do recall having seen them both at Mr. Bursey's house?

A. Yes, sir.

Q. Do you recall the circumstances of that meeting? How you got there; that sort of thing.

A. The particular meeting that they were talking about, I don't recall having been out there early in the day when there was no one else present. I recall being out there at night, when there were other people present, a social gathering. I have seen them at Mr. Bursey's at a social gathering and also, as Mr. Wise testified, at an ACLU party.

Q. An ACLU party?

A. Yes, sir.

Q. That was a purely social occasion?

A. Yes, sir.

Q. There was testimony there was a later prearranged meeting at your house, approximately a week prior to the trial, involving Mr. Wise, Mr. Bursey and you. Do you recall such a meeting?

A. No, sir.

Q. Do you recall being present at your house at about that time, when Mr. Wise and Mr. Bursey were present?

A. No, sir—

Mr. MCDONALD: I believe the meeting was at Mrs. Maybank's house.

Q. All right, Mrs. Maybank's house. (Addressing counsel) Thank you, Mr. McDonald. (Addressing the witness) Do you recall a meeting at Mrs. Maybank's house with Mr. Wise and Mr. Bursey?

A. I recall seeeing Mr. Bursey there a couple of times. I don't recall ever seeing Mr. Wise there, but it could have been that they tsopped oy at the same time that I stopped by. They indicated yesterday, when Mr. Bursey was testifying, that I came in during the rain with a chicken box, and so forth. That somehow seemed very plausible that I could have stopped by at the same time that they had stopped by, but it was definitely not prearranged, and I probably paid it no attention if it did happen.

Q. Do you have an independent recollection of such a meeting?

A. No, sir, I do not.

Q. Do you have an independent recollection of having discussed the details of the case with Mr. Bursey and Mr. Wise at any time?

A. No, sir, Mr. Wise asked me questions in the past, and I would answer those questions, and that would be the extent of it.

Q. Do you recall in what detail those questions went, so far as the case was concerned?

A. They usually centered around whether or not I had seen Mr. Taylor again, and, if so, what were we doing, and in each instance, I had not seen Mr. Taylor again, and I would so inform him, tell him I had no idea what he was doing, because I had not talked with him again. That's my primary recollection of the conversations with Mr. Wise.

Q. Did you ever at any time seek out Mr. Wise or Mr. Bursey for the purpose of discussing this case in any respect?

A. No, sir, I did not.

Q. Did you discuss this case in any of its aspects, after you were arrested, with Chief Strom, any other SLED agent or the solicitor or his office until the morning of the trial?

A. I definitely wouldn't have with the solicitor. I don't think I did with Chief Strom. If I did with any other SLED agent, it was solely in passing, just some comment about the case, but no real discussion of it at any point.

Q. Did you know, Mr. Weatherford, prior to the morning of March 20, 1970, that you would be used as a witness in this case?

A. No, sir, I did not.

Q. Had you ever discussed that with Chief Strom or any of his agents?

A. No, sir, I had not.

Q. After the break-in, after your participation therein with Mr. Bursey and the arrest, what was your general connection with the case and your general thoughts about it?

A. Well, my connection seemed to have been ended. We had—we were responsible for obtaining evidence and obtaining the people who participated and so on, and for us, it was over. It was up to the Courts to take care of it then, and we had other business to attend to.

Q. Why, Mr. Weatherford, did you not, after the break-in, after you had possession of the facts and so forth, about which you later testified, why then did you not reveal your identity as an undercover agent to Mr. Bursey and to his lawyer?

A. Well, I was continuing to work in other matters.

Q. What other matters? What type matters?

A. The same type undercover work, throughout the area of South Carolina.

Q. Was your work in connection with Brett Bursey prior to the break-in one of your major assignments at the University?

A. No, sir, it was not.

Q. Was your work confined to the University of South Carolina campus, for example?

A. No, sir, it was not.

Q. What were generally the territorial limitations of your jurisdiction as an undercover agent and officer?

A. The limitations were the State of South Carolina.

Q. State whether or not you did carry out assignments outside of the City of Columbia?

A. Yes, sir, I did.

Q. Approximately how many? Do you know?

A. Probably a dozen or so, around in almost all parts of the State: Charleston County, Horry County, Greenville, Anderson, Aiken, Beaufort, Dorchester, just throughout the State, at various times.

Q. Were you a commissioned agent of the South Carolina Law Enforcement Division?

A. Yes, sir, I was.

Q. How long did your employment in that capacity continue after the Draft Board incident?

A. After the incident, almost six months, I believe.

MR. COLEMAN: Thank you. You may examine him.

CROSS EXAMINATION

By Mr. McDONALD

Q. Mr. Weatherford, where were you born?

A. Darlington County, South Carolina.

Q. And did you grow up there?

A. Well, off and on. My father was in service, so I was away at times and back at times.

Q. Where else did you travel with your family?

A. Well, I lived for about ten years in Columbia. We lived in Germany for about five years, and then we briefly lived in North Carolina and Georgia and Texas and Kansas.

Q. Where have you attended school? You discussed your plans to go abroad this year and next year. Where did you take your undergraduate degree?

A. At the University of South Carolina.

Q. What was that in?

A. Political Science.

Q. And you are doing graduate work, I believe, out in California?

A. Yes, sir, that's right.

Q. And what was that in?

A. Anthropology.

Q. Now, Mr. Weatherford, how did you come to work with the South Carolina Law Enforcement Division?

A. Through the recommendation of Mr. Sonny Clark and Mr. Ronald Cook.

Q. And Mr. Cook, I believe, was the gentleman who testified yesterday?

A. Yes, sir, he was.

Q. And he arranged the meeting with you and Mr. Strom?

A. I'm not positive who arranged it, but it was one of the two, I believe.

Q. Can you tell me what you and Mr. Strom talked about when you had that meeting?

A. It was just a general introduction: where I had worked; what I had done before; that type of discussion.

Q. Did he tell you what he expected you to do as an agent?

A. I don't think at that time there was any more than just an introductory meeting, as I recall it. It's been over five years ago. I'm not sure.

Q. Did you subsequently have conversation with Mr. Strom in which he told you what he expected you to do as an agent?

A. With either Mr. Strom or other people, I would get information about what I was supposed to be doing at various times.

Q. What information did you receive as to what you were to do as an undercover agent?

A. Well, in each assignment, there was totally new information about where the case was and what it was and so forth. So, each assignment was different.

Q. Were you given an assignment by Mr. Strom to infiltrate the University and find out what was going on there?

A. No, sir, I was never given an assignment to infiltrate anything.

Q. Were you given an assignment by Mr. Strom to keep your eyes open, to see what was happening at the University of South Carolina?

A. I don't believe he ever mentioned the University in particular. At least, I don't recall it.

Q. Do you know whether or not he ever told you to infiltrate a group called "AWARE" at the University of South Carolina?

A. No, sir, I don't think he did.

Q. Is your recollection that he did not tell you to do that?

A. That would be my recollection that he did not mention anything in particular about infiltrating any particular group, organization or anything like that.

Q. Now, let me remind you that you are under oath. Let me ask you again whether or not—

Mr. COLEMAN: The witness need not be reminded, your Honor.

The COURT: That's a proper question—or statement.

Q. I want to ask you again whether or not Mr. Strom ever instructed you to find out what was happening at the University of South Carolina and in particular to find out what was going on with the so-called AWARE group?

A. To the best of my recollection, I don't recall him ever focusing my attention either on AWARE or on the University in particular, to infiltrate or—

Q. Let me direct your attention to Page 57 of the trial transcript in *South Carolina versus Bursey,* which has been introduced into evidence as Plaintiff's Exhibit Number 4. I would like to read the redirect examination or portions thereof by Solicitor Foard. "Question: When did I first tell you you were going to testify and your identity be revealed?" "Answer: About 30 minutes before I came into the courtroom." "Question: This morning?" "Answer: Yes, sir." "Question: That was the first time you knew that you were going to have to reveal your identity?" "Answer: Yes, sir, that's correct." "Question: Counsel asked you

about belonging to these subversive groups like AWARE and all. Who told you to get into those groups?" "Answer: I went into those groups under instructions of Mr. Strom." "Question: Mr. Strom?" "Answer: Yes, sir." "Question: And in your instructions, were you just to follow what the other people told you to do?" "Answer: Primarily and report back to Mr. Strom what was going on." "Question: And you have been giving Mr. Strom reports now for how long did you say?" "Answer: Approximately a year."

Would you care to explain that testimony?

A. I think I had general instructions to watch out for certain type of activity. That didn't mean that I was ordered to infiltrate any particular group or organization. Now, the fact that if I infiltrated them as a means to do that, that doesn't necessarily mean that I was ordered to do it.

Q. But you were asked by Mr. Foard, "Counsel asked you about belonging to these subversive groups like AWARE and all. Who told you to get into those groups?" "Answer: I went into those groups under instructions of Mr. Strom."

Now, if you are saying that was not a correct response to that question, would you explain that, please?

A. I'm not saying that that's not a correct response to the question. I'm saying that in response to his orders to find out what was going on with certain elements in the area, that then I inferred from that that I had to go into those organizations to find out.

Q. When did you first make the acquaintance of Mr. Bursey, Mr. Weatherford?

A. Probably in September of 1969.

Q. Can you recall the circumstances of that—of the making of that acquaintance?

A. Yes, I recall the first time I met him.

Q. Where was that?

A. That was in the UFO Coffee House, on Main Street.

Q. Had you received any instructions from Mr. Strom or anyone at SLED about the UFO Coffee House?

A. Not to my recollection, no, sir.

Q. When you received your instructions from Mr. Strom about your assignment at the University, was there any understanding about reports that were to be made by you to him?

A. No, sir, there was not.

Q. You had no understanding at all about whether or not you were to report to him?

A. You mean at all or a systematic way? I didn't understand the question.

Q. Whatever the understanding was.

A. That I would get in touch with somebody at SLED or get word to somebody at SLED if there was anything that they needed to know.

Q. And that included making reports to Mr. Strom?

A. Yes, sir.

Q. And did you in point of fact make reports to Mr. Strom?

A. You are talking about either oral or written? You are not talking about necessarily writing out a report?

Q. Any kind of reports?

A. I would phone in occasionally. I would see him occasionally too.

Q. When did you see him? Did you have a regular time that you would go to the SLED headquarters?

A. I would go to SLED headquarters to pick up my check.

Q. And how often did you do that?

A. Every other Friday, I think. It was every other week. I think it was a Friday.

Q. So, you visited SLED every other week during the entire time you were employed by SLED?

A. Yes, sir.

Q. Did you have occasion to talk with agents there?

A. Yes, sir.

Q. At those times, including Mr. Strom?

A. Yes, sir.

Q. And did you discuss your assignments and that sort of thing on those occasions?

A. If they had something in particular to tell me, they would tell me.

Q. Or if you had something to tell them?

A. Yes, sir.

Q. And in addition to that, you made—you had telephone communications with Mr. Strom?

A. Yes, sir.

Q. And you had telephone communications with other members of SLED?

A. Yes, sir.

Q. And this would have been during the entire time you were employed by SLED?

A. Yes, sir.

Q. Now, when were you first hired? I believe you told us, but I want to make certain that I recall the date correctly. When were you first put on the payroll?

A. In August, of 1969.

Q. When did you leave the payroll?

A. In September, of 1970.

Q. Did you make any written reports to Mr. Strom or anyone else concerning any assignment you may have been given?

A. Sometimes, when I couldn't get a-hold of the Chief, he was out-of-town or for some reason I couldn't get in touch with him, I would just jot him a memo, but this was not in the form of a permanent report or anything like that.

Q. When you say you would "jot him a memo"—

A. Just leave a note, if I couldn't get in touch with him, or leave a message; or if I were at SLED headquarters and he was not there, and I wanted to leave any kind of information about anything for him or anyone else, then I could just leave him a note, but other than that—

Q. What would you say in the note? Can you give me an instance in which you did leave a note, a specific instance, and tell me exactly what you said in the note, as an instance of your—

Mr. COLEMAN: Your Honor please, I hate to interrupt, but what is the report regarding—

The COURT: I think his whole arrangement and mode of operation with SLED is pertinent. He can go into it.

Go ahead. What type of notes did you leave? What would you say—not about some case that may be presently pending, but something that you were investigating for Chief Strom, and you wrote him a note.

The WITNESS: Yes, sir.

The COURT: What type of note would it be?

The WITNESS: I could say something like there was a demonstration planned at a certain place at a certain time and a rough estimate of how many people I thought might attend it and whether or not I knew of any particular type of illegal aspects of it, just a note like that.

Q. Would you mention any particular names?

A. It's possible. Now, I don't recall every particularly—usually, if I left a note, it was something that wasn't particularly important, because if it was that important, I would get word to somebody.

Q. Did you ever leave a note which concerned in any way Mr. Bursey?

A. Not to my recollection, no, sir.

Q. Now, was there any variation in the level of your visits to SLED or your reports to Mr. Strom during the period of time before or after Mr. Bursey's arrest on March 20, 1970?

A. When I was in town, I would assume not. I spent a great deal of time out of town after the arrest, more time than I had during the previous year, so in that sense, I was gone for several days at a time.

Q. Are you saying there was a difference in the overall rate?

A. Yes, sir.

Q. But you still were in some sort of contact? Were you still making the every other week visits to pick up your check?

A. Yes, sir, and almost always when I was out of town, it would be with another SLED agent, so I was in constant contact with someone from SLED.

Q. Did you have direct contact with Mr. Strom following Mr. Bursey's arrest?

A. I don't recall it, no, sir.

Q. You don't—

A. I could have seen him when I went out to pick up my check, in passing, spoken to him. I spoke to a lot of people out there every time I picked up my check, but I don't think there was any kind of conversation about anything or any time when he wanted to see me or needed to see me or I needed to see him.

Q. You have no recollection of any specific occasion following Mr. Bursey's arrest, on which you talked directly to Mr. Strom?

A. No, sir, I do not.

Q. Do you recall whether or not you talked to him about the—what's been referred to in testimony as the Russell House take-over in May, 1970?

A. Yes, sir.

Q. What's your recollection about that?

A. It was all on the telephone but I did talk with him.

Q. Mr. Strom?

A. I don't think it was right then at the time of the Russell House take-over, but a few days later, during the time of the riots.

Q. So, that would have been a specific occasion after Mr. Bursey's arrest on which you talked to Mr. Strom?

A. That was after the—I guess that was after the arrest, so that would be, yes, sir.

Q. Search your memory well, if you will, and tell me whether or not you talked with Mr. Strom about anything else following Mr. Bursey's arrest, on any other occasions?

A. Not to my recollection, no, sir.

Q. Let me ask you whether or not you had occasion to talk to him about what's been testified to here earlier as the Hilton Head incident?

A. No, sir.

Q. Where you and—

A. No, sir.

Q. You don't recall ever discussing that with Mr. Strom?

A. No, sir, I didn't know that he knew.

Q. Do you think you might have?

A. No, sir, because I didn't know that Chief Strom knew. I knew he had given me permission to go on vacation, but I don't think that I was even aware that he was aware of the incident having happened down there.

Q. Let me direct your attention to Page 143 of your deposition, which has been introduced into evidence as Plaintiff's Exhibit 5, and a question was put to you by counsel. "Question: Did you tell Mr. Strom about the Hilton Head episode?" "Answer: Yes, probably, but I don't recall in particular discussing it with him."

Would you care to comment on that testimony?

A. Then I still say I don't recall it.

Q. But you state you probably did. Can you explain that, what you meant by that?

A. Well, we certainly discussed it a great deal recently; since the time of the trial, it's come up repeatedly, but I don't recall ever having discussed it with him prior to the trial.

Q. In your deposition—your testimony now is that when you said in your deposition that you probably discussed it with him, you were talking about after this lawsuit was filed?

A. Perhaps. I'm not sure.

The COURT: He said in the next question and answer, Mr. McDonald, that he has no independent recollection of it—I mean, in his deposition; so, I think you've got to put the question in its proper context, and that was the next question and answer.

Mr. MCDONALD: Yes, sir, but he did say he probably did, and that's confusing.

The COURT: He said, "Yes, probably, but I don't recall in particular discussing it with him." "Do you have any independent recollection of that?" "Not any particular instance, no, sir."

So, he said he probably did but he doesn't remember it.

Mr. MCDONALD: All right, sir. I was just wondering whether or not he was talking about specific details as opposed to simply the occasion, but I'll go on, your Honor.

Q. Now, I believe you were an officer of the AWARE group, were you not, Mr. Weatherford?

A. At least informally. I don't know if there were any formal officers or not, but there was an agreement that there were three people who would be designated as co-Chairmen, yes, sir.

Q. And you were one of those?

A. Yes, sir.

Q. As an undercover agent, were you required to have a bond?

A. Yes, sir.

Q. And were you bonded?

A. Yes, sir.

Q. What was the amount of that bond?

A. I have absolutely no idea.

Q. Now, you were one of the people who participated in the session that planned the demonstration on the Local Selective Service Board? Is that correct?

A. I was present, yes, sir.

Q. And you played an active role in that demonstration, did you not?

A. Yes, sir.

Q. Tell me what your role in it was.

A. I was present during all the planning of the incident; I was present during the entire execution of the incident.

Q. And you actually defaced the building, did you not?

A. Mr. Bursey said I wrote the word "Peace" and I possibly did, if he said that, but I actually do not recall having done it. It could well be.

Q. Let me direct your attention, if I may, to your testimony at the trial of the case, Page 44 of the trial transcript. A question was put to you by the prosecutor in connection with the identification of some photographs. "Question: Well, let's take one of them. For example, this one. Who did that?" "Answer: I believe this is the one in the back, and I wrote the word 'Now' and Mr. Bursey wrote the word 'Peace' and the symbol." Let me direct your attention to Page 45.

A. If I testified like that in Court at the time, then I'm sure that that was true, because the trial was only three months after the incident. As I say, now I was only going on what I thought I heard in Court yesterday and saying that that was probably true, but I'm really not sure. If it's in the Court record and I said it at the time, then I'm sure that it's true.

Q. You are sure that you did paint "Now"?

A. If that's what I said, yes, sir.

Q. Do you recall whether you did anything else as an active participant in that demonstration? Do you recall whether or not you threw a brick at the building?

A. I was supposed to throw a brick through a window, but I did not do it.

Q. Did you throw a brick at all?

A. I threw it up against the wall, so that it would just—you know, I just tossed it this way, in running, and that was it, so it didn't strike anything that was breakable.

Q. It hit the building, you say?

A. Yes, sir.

Q. And you and Mr. Bursey did the identical thing, in effect?

A. Sir?

Q. You and Mr. Bursey, I believe, did the identical things on that occasion? Did he not write something on the wall and throw a brick?

A. I believe he did, yes, sir.

Q. Now, there was a third person, was there not, who participated in that demonstration or episode at the Local Board? Is that correct?

A. I believe there were several people, yes, sir.

Q. I'm sorry?

A. I believe there were several other people, yes, sir.

Q. How many people were at the site of the Local Board?

A. I believe four of us went. One person drove, and I guess the three of us went up to the building, if I recall correctly.

Q. Who was the third party?

A. I don't recall the name. I'm sure that it's right there in the record, but I don't recall the name.

Q. Does the name, "Mr. Mererick" job your memory?

A. It could have been Mr. Merrick.

Q. Do you know a Mr. Merrick?

A. From the testimony yesterday, I assume that that was the name. I didn't know the other people involved in the incident at the time, so, I assume that that is the name of the person who was with us; but at the time, I don't believe I even knew his name. I mean, I could have, perhaps, but, if so, I had only met those other people within the two days of the incident; and I don't think I ever saw any of them again after the incident; so I'm not too positive on the names.

Q. So, you have never seen this third party, whether he was Mr. Merrick or not, after March 20, 1970?

A. Yes, sir, I do not think I have ever seen him again.

Q. Do you know whether or not that third person was an agent for some law enforcement agency?

A. No, sir, I have no knowledge.

Q. Now, I believe—there has been testimony here that there were several people who met at Gantt's Restaurant prior to the demonstration at the Draft Board. Do you have recollection of that meeting?

A. Yes, sir.

Q. And you were present, were you not?

A. Yes, sir, I was.

Q. Do you recall who else was present?

A. Mr. Bursey, and there were more people present than participated in the incident, but I'm really not sure who they were right now. That may be in the Court record from the trial. I'm not sure.

Q. Do you know who Jay Hayes is—H-a-y-e-s?

A. Yes, sir, I do.

Q. Do you know whether or not he was present in that meeting at Gantt's Restaurant?

A. It's very probable. I'm not positive right now, but he was certainly around at that time, and he was also—

I believe he was a friend of Mr. Bursey's. I saw them together frequently.

Q. How many people were actually present at the meeting at Gantt's? Did you say?

A. No, sir, I didn't say, but I know that there were the four people involved in the incident plus some; so, perhaps six or seven. I'm not positive.

Q. And you believe that Mr. Hayes was one of the people you put in the category of "plus some"?

A. It's very probable. I hate to say definitely he was, because I'm just not sure.

Q. Do you know whether or not Mr. Jay Hayes was working as an undercover agent for any law enforcement agency?

A. No, sir.

Q. You have no knowledge whether or not he was an FBI undercover agent?

A. No, sir.

Q. Following Mr. Bursey's arrest and your arrest on March 20, did you receive any particular instructions from Mr. Strom or anyone else at SLED?

A. Well, as I say, I was sent out several times during that period to do out-of-town work, and instructions each time could have come from Chief Strom or from a number of other people at SLED headquarters. I'm not sure who sent me on various assignments.

Q. Was it your understanding you would be doing the same thing you had always been doing?

A. Before and after the trial?

Q. Before and after the arrest of Mr. Bursey?

A. Yes, sir.

Q. That you wouldn't vary your routine as an undercover agent in any way?

A. Well, I had various new assignments, but sort of the general overall theme was the same, yes, sir.

Q. And that would include maintaining your cover as an undercover agent?

A. Yes, sir.

Q. Was it difficult to do that, incidentally, to maintain a cover?

A. There were numerous problems.

Q. I'm sorry. I didn't—

A. There were numerous problems.

Q. What were some of them?

A. What were some of the problems?

Q. Yes.

A. The possibility of being seen, such as at SLED headquarters, or in the company of other police officers, or the possibility that people might have information about you, and you just don't know that they have it. I think that's the primary—

Q. The possibility of being seen by Mr. Bursey, for example, when you were in the company of law enforcement officers, was one of the problems of maintaining your cover, following the arrest?

A. No, sir, that's just a general problem that I always had. Whenever I met with other officers, I certainly tried to do it in a manner which I didn't think I would bump into anyone with whom I had been working.

Q. You had the problem in Mr. Bursey's case just as you had in any other case that you worked on?

A. That was constantly a problem, yes, sir, in all situations.

Q. Now, I believe you retained an attorney to represent you following your arrest? Isn't that correct?

A. Mr. Frank Taylor.

Q. Why did you do that?

A. It was suggested by someone, and the solicitor has testified that he was the one to suggest it, so I assume that he was, and, so, I met with Mr. Taylor.

Q. Well, why did you feel that you needed an attorney?

A. I didn't, I don't think.

Q. You did not feel—

A. Except to keep the cover.

Q. You felt you—

A. I mean, I felt I needed an attorney's name, who would agree, "Yes, I am his attorney." I didn't feel that I needed his services in the courtroom or something like that.

Q. You needed an attorney so people would think you were a regular criminal defendant?

A. Yes, sir, and also to make sure that there was no chance of my being drawn into the other case, into Mr. Bursey's case.

Q. All right, sir, now let me direct your attention, if I may, to Page 91 of your deposition. You were asked, "Question: Why did you get Mr. Taylor's name?" "Answer: Because Chief Strom suggested that he would be the person to do it."

Would you comment on that testimony?

A. Comment in what way?

Q. Is it your best recollection that Mr. Strom was the person who suggested Mr. Taylor to you?

A. It was my impression that he had been the one suggested. As I say, it was the secretary who called me to tell me the incident, and I don't recall really if it was Chief Strom's secretary or perhaps Solicitor Ford's secretary or perhaps someone else at SLED, but it was my impression that arrangements had been made or suggestion had been made by Chief Strom. I had no direct knowledge of the situation. I just knew that I needed someone to act as a cover, and, of course, I had no earthly idea who would do that, and someone else made the decision, either at SLED or at the solicitor's office. I just don't know.

Q. And in your conversation with Mr. Bursey, did you represent to him that Mr. Taylor was your attorney?

A. Yes, I did.

Q. And I believe you testified that you met with Mr. Wise, Mr. Bursey's attorney, on some occasions following the arrest. Did you represent to him that Mr. Taylor was representing you?

A. Yes, sir, I did.

Q. You were arrested with Mr. Bursey at the Russell House? Is that correct?

A. Oh. Yes, sir.

Q. You both were taken to jail in the same automobile, and you were handcuffed together?

A. Yes, sir.

Q. Did you have any conversation with Mr. Bursey during the arrest and during that trip to the jail?

A. Not that I recall. I recall him either wishing me luck or something as we were being unhandcuffed and taken away, separated.

Q. How long were you actually in jail?

A. In the building itself—in the jail—

Q. Under lock and key, on that occasion, yes, sir.

A. I stayed in there a couple of hours, I guess.

Q. Describe the circumstances of your release from jail? Did you have to post a bond, for example?

A. I think within—yes, within the next couple of days, a bond was posted, yes, sir.

Q. But you were released without a bond?

A. First, I wasn't released. I was still supposed to be in jail, and so I briefly went out of town.

Q. I see.

A. I went out in the country.

Q. I want to make sure I understand the chronology. You were arrested, locked up a couple of hours; they released you and said, "Go out of town"?

A. No one told me to do that. I just went out with some of the other agents. They took me out in the country, so I wouldn't have to spend the night in jail, and sometime —I think it was late the next day, I returned, and by then, someone had made the arrangements for the bond, and—so I think it was probably by the next night, I was back home again.

Q. But you didn't go to your home, so you wouldn't be seen presumably?

A. Yes.

Q. That was to maintain your cover?

A. Yes.

Q. Who posted your bond?

A. Dr. James Hardwick signed it, if that's the same thing. He was the one who supported me.

Q. And again, was that done to maintain your cover?

A. Yes.

Q. And to give the illusion that you were a regular criminal defendant?

A. Yes, sir.

Q. Now, when you were released on your bond, following your actual release, did you have occasion to meet with Mr. Bursey?

A. He was in jail for sometime. He testified it was twelve days, and that he saw me on the day of his release, that we met at someone else's house, and that sounds very plausible. I don't recall the incident, but it makes sense.

Q. Did you discuss with him the length of time that you respectively had spent in jail?

A. It's possible. I don't recall.

Q. He didn't say, "I've been in for twelve days; how long have you been in"? Did you have that kind of conversation with him?

A. I don't think so, no, sir.

Q. Did you ever have occasion to tell him who had done your bond?

A. If he asked, I'm sure I would have told him, because that's why Dr. Hardwick had done it, so that no one would know that I was a SLED agent.

Q. Do you recall ever discussing the matter of your bond with Mr. Wise?

A. No, I don't recall it.

Q. I believe you testified you didn't know for sure that you were going to be a witness until the morning of the trial? Is that correct?

A. Yes, sir, that's correct.

Q. But it had always been a possibility, had it not, from the very beginning, that you would be a witness? Isn't that true?

A. Yes, sir, in any case that I had ever been involved with, there's always a possibility that I may be a witness in the courtroom, yes, sir.

Q. So, you were prepared to take the stand from the very beginning? Is that correct?

A. You mean from the beginning of my employment? Yes, sir.

Q. And from the beginning of Mr. Bursey's arrest?

A. For any case, I was prepared to be called into Court at any time for any case.

Q. Now, I believe you applied to be a member of the Venceremos Brigade? Is that correct?

A. Yes, sir, that's correct.

Q. Will you tell me why you—well, tell me when you put in your application.

A. I think that was in the spring of 1970, but I'm not positive exactly when the Venceremos incident was.

Q. Was that after Mr. Bursey's arrest? Do you recall?

A. No, sir, I'm not sure. It could have been, but I'm just not sure.

Q. Why did you apply to be a member of the Venceremos Brigade?

A. A number of people had suggested it. I had seen a number of people passing through the State, who had been affiliated with the Venceremos Brigade, and I thought it would be a good opportunity to find out exactly what was going on in this area in relationship to the Venceremos Brigade.

Q. Was that in connection with your duties as agent for the South Carolina Law Enforcement Division?

A. As a general part of those duties, yes, sir.

Q. You were instructed by someone to go down to Cuba?

A. No, sir, I never intended to go to Cuba, but I said a lot of people who were participating in that program were coming in and out of South Carolina. I didn't know of any people who resided here permanently who had been in it, but they were passing through and staying for various lengths of time. So, in order to find out—generally, those people appeared to be perhaps more radical, say, than a lot of other radicals, and I thought it worthwhile at least to find out exactly what was going on.

Q. Where did you go to have your interview to be a member of the Venceremos Brigade?

A. The interview was in Atlanta, Georgia.

Q. Did that interview involve any South Carolinians?

A. I don't know who the people were that interviewed me.

Q. You don't know who they were?

A. No, sir. They were obviously affiliated with the Venceremos Brigade in some way but I don't know how.

Q. Did you have any knowledge of how they might be connected with the State of South Carolina?

A. Those particular individuals that interviewed me?

Q. Right, sir.

A. Not that I recall.

Q. What was your—

A. I don't think I ever met them here or anything like that.

Q. What was your understanding of what the Venceremos Brigade did?

A. From the people in the Venceremos Brigade that interviewed me?

Q. What was your understanding of what their role in life was, what their program was?

A. My general understanding from the public media and all? I'm not sure—

Q. Or however you got your understanding, just what your understanding was.

A. There was a group of revolutionaries who spent considerable time in Cuba on—well, at least, on one small island off the coast of Cuba—and I actually didn't know what they did, and I kind of wanted to find out if—see if it had any relevance to what was going on here, since so many of those people seemed to be involved with what was going on here.

Q. What did you find out about that Vanceremos Brigade?

A. I found out that at that particular time, there weren't that many of them in the South, and they, of course, were leaving on another expedition to Cuba at some point that was fairly close in time. I don't remember exactly when; and—

Q. Did you discover that they were doing anything unlawful?

A. You mean either here or in Cuba?

Q. Or anywhere?

A. No, sir, I didn't have—I only spent one afternoon with any of the members, so I didn't have much of a chance to find out a great deal.

Q. Mr. Weatherford, let me direct your attention, if I may, to what has been referred to as the Hilton Head meeting, conference between you and law enforcement officers. Can you tell me how you came to meet with them in Hilton Head?

A. I was on vacation.

Q. And who did you meet with?

A. There were a number of people from SLED who all went down. Mr. Sonny Clark went down from the Sheriff's Department; and Mr. James Anasti; Mr. Richard Freeman. Those were the four I knew best. Whether or not there were a couple of others—seems like there were, but I'm not sure who they were, but I know those four went with us. We all four went together.

Q. It was a planned outing, for all of you to go there together as a group?

A. Yes, sir.

Q. Now, I believe you testified that you thought that your cover had been blown down there. Can you expalin why you thought that?

A. No, sir, I didn't—

Q. Fear that it might be?

A. Yes, there was a fear. I didn't think that it had, but one of the people in the group that I was with, Mr. Anasti—Mr. Anasti thought that he recognized a man down there as being someone who lived in the same house with Mr. Bursey; and, as I recall, it was, in fact, the same person, and he had seen me from a distance. I had no idea whether or not he knew who I was or recognized me, because I had seen him at the house before, even though I didn't really know him personally, so I thought there was a chance that he might have recognized me. I didn't necessarily think that my cover had been blown. There was a possibility.

Q. What did you do as a result of that incident?

A. Well, I turned around and walked back the opposite direction, around the building.

Q. All right. But when you got back to Columbia, did you do anything as a result of having been seen by someone you thought was Mr. Bursey's roommate?

A. Well, when I returned, there was a message that Mr. Bursey wanted to see me, and, naturally, I was rather apprehensive as to what that might be in reference to, since this incident had just happened.

Q. Did you resolve on any course of action to maintain your cover?

A. Well, I believe I tried to return Mr. Bursey's call and he wasn't in. I think he was out of town, if I recall correctly, and he wasn't going to be back for a couple of days; so, I waited until he came back and returned it again, and I decided that if he, in fact, wanted to ask me about that or confront me with it, that I would try to forestall that by giving him a cover story first; and, of course, as Mr. Bursey has testified, that's in fact what I did.

Q. You were concerned that your cover would be blown, so you cooked up a story that the agents had contacted you to get you to confess; and you resolved that to insure your cover, you were going to tell Mr. Bursey that so his suspicion would be disarmed, and in point of fact, you were the one who broached the whole subject to him? Isn't that correct?

A. Yes, I believe it is.

Q. You initiated the cover—

A. The story.

Q. —about the Hilton Head incident? Isn't that correct?

A. Yes, sir, that's correct.

Q. Now, you remained in the employment of SLED following Mr. Bursey's trial, did you not?

A. Yes, sir, that's correct.

Q. And you continued to work as an undercover agent? Is that correct?

A. Following the trial?

Q. Yes.

A. Well, following the trial, an awful lot of people knew who I was. I think I did do some work out of town.

Q. So, you still continued to work as an agent even after the trial?

A. Oh, yes, sir.

Q. And you still continued to do the law enforcement work you had been doing before the trial?

A. It certainly changed after the trial. I mean, I was fairly much known after the trial, so it was difficult to do anything really under cover.

Q. Did you think you still had a value to SLED even after the trial?

A. Oh, yes, sir.

Q. And did you think your usefulness had been diminished or your role simply changed as a result of the trial?

A. I never stopped to consider it.

Q. You just—

A. I think in due time, I could have established a whole new role in which I could have been just as effective. Of course, I can't change from one day being one thing—or say one month being one thing and the next month, being a very good above-the-ground sort of agent. I think in due time, had I stayed, I could have been just as effective in most any capacity out there.

Q. In other words, the revelation of your identity as an agent would have been no net loss to law enforcement in South Carolina. Your role would have changed; that's all.

A. Had I stayed on—had I been planning to stay on, say, for another year or so. As it was, I was planning on going to graduate school, so I knew that I would be in the role of above-cover agent for only about two months or three months, a reasonably short time, because I was going to be entering graduate school in September. So, during that short a time, I didn't really have a chance to develop a very good new role.

Q. You certainly could have?

A. In due time, yes, sir.

Q. Let me direct your attention—did your work decline following the arrest? Did your assignments taper off —I'm sorry, following the trial?

A. I spent a great deal more time concerned with my own safety, and that was honestly my primary concern during the time, but I was doing work, whether or not it was the exact same level as that before. There was so much variability from even one month to the next during my whole term of employment there.

Q. Let me direct your attention, if I may, to Page 128 of your deposition, and you were asked the question by counsel, "Question: Do you have any recollection of whether or not your work tapered off during that period of time?" "Answer: No, sir, my work didn't taper off until I left in Septemeber of that year."

You don't care to change that testimony or comment on it?

A. No, sir, I don't need to change it. I can't think of any comment to make on it. I did point out in the deposition that there was that extreme variability from—sometimes from one week to the next; you would do a great deal one week and not so much the next.

Q. All right, sir, now, you have heard testimony, have you not, from Mr. Wise and Mr. Bursey about certain meetings they say they had with you. I just want to make clear now, you do recall the last meeting or the one before trial, the one involving rain and the box of carry-out fried chicken. You recall that?

A. I recall the testimony, yes, sir, but I don't recall the incident.

Q. You don't recall such a meeting at all?

A. No, sir. I recall the testimony yesterday.

Q. Your testimony is that you don't remember that you actually were there under those circumstances?

A. Yes, sir, that's correct.

Q. And your testimony also is you have no recollection of any meeting shortly after Mr. Bursey's release—and I believe it was in the second or third week of April, of 1970—you have no recollection meeting with Mr. Bursey and Mr. Wise?

A. No, sir. As I said, I know that I have seen Mr. Bursey and Mr. Wise together at Mr. Bursey's home. During that time, I was constantly involved in other cases, and that case was the least of my concern, because, as far as I could tell, it was—our involvement in it was over. We had solved it and we had the evidence, and from then on, it was up to the Court. Of course, I still came into contact with them just as a result of the kind of activities I was doing, and naturally—at least Mr. Wise was always asking questions, particularly about my attorney, wanted to know what Mr. Taylor was doing, and I would try to dismiss it as quickly as possible; and I certainly didn't pay it any attention at the time; and I certainly—there was nothing that I wanted to remember for any length of time. Any time a situation like that came up, I was trying to get out of it, and I did have work going on at the time that was important, and I was trying to do, and that was my concern at the time. In retrospect, it's diffcult to absolutely deny some of those situations as having happened, but I do absolutely deny that there was any prearranged meeting — or any prearranged meeting that I knew of with Mr. Wise.

Q. You absolutely deny that you and Mr. Bursey and Mr. Wise had a prearranged meeting at Mr. Bursey's house where you sat down around a rock pile at a pond, I believe the testimony was?

A. That I knew it was a prearranged meeting with Mr. Wise, yes, sir.

Q. You absolutely deny that that meeting took place or that it was prearranged?

A. As I said, I saw them out there several times during the course of those few months, and what I deny is that I ever went anywhere at any time to meet with Mr. Wise, even though, in fact, I sometimes saw him. It was, as far as I knew, a coincidental. It may have been arranged by the people without my knowledge, but as far as I knew, it was certainly coincidential.

Q. Now, I'm afraid I'm confused.

The COURT: I'm not, so go on to something else. He said if it was prearranged, it was prearranged by somebody else and without his knowledge. Isn't that correct?

The WITNESS: Yes, sir.

Mr. MCDONALD: That's what I'm not sure of, is whether he denies meeting—

The COURT: No, he doesn't deny the meeting. He says he went to the meetings, but he denies knowing that they had been prearranged.

Mr. MCDONALD: I see. All right, sir.

Q. Do you recall having any conversation with Mr. Wise concerning the likelihood or possibility of your being a witness against Mr. Bursey?

A. No, sir, I don't.

Q. Let me—

A. I just—

Q. I'm sorry?

A. The only time that that even—that topic came up, to my knowledge, was in the discussion with Mr. Bursey, that I had in reference to Hilton Head, but I don't recall Mr. Wise having ever asked me anything about being a witness.

Q. Well, did Mr. Bursey—what did Mr. Bursey and

A. I actually don't recall. I think that—Mr. Bursey testified yesterday in Court, I think, that he had told me to do whatever I could to get out of it and perhaps that's what it was. I don't recall the details of the discussion, because at the time, my only concern with that conversation was to —if I had, in fact, been spotted at Hilton Head, I wanted to cover up that, and so I remember that very well, whereas, anything else, I was just trying to dismiss it.

Q. Did anybody tell you or request that you not be present in Court for Mr. Bursey's trial?

A. I think the night before the trial or else two nights before the trial, I was at a party at Mr. Bursey's house, and Mr. Wise said that he didn't want me in Court, and I said that I had no plans to go.

Q. So, you did have a discussion with Mr. Wise?

A. About being in Court, but it wasn't about whether or not I would be a witness.

Q. You couldn't be a witness if you weren't there, could you?

A. He asked if I were planning to go to Court, and I wasn't, so I told him, "No," I wasn't planning it.

Q. And yet you have testified that you knew all along there was a possibility you would be a witness.

A. From the day that I started with SLED, I, of course, knew that at any point, I might be called in any case.

Q. Okay. Let me direct your attention, if I may, to Page 52 of the transcript of Mr. Bursey's trial. On cross examination, Mr. Wise asked you the following question: "All right, Mr. Weatherford, did you have a conversation with me yesterday?" "Answer: I did." "Question: Did I ask you if you were going to be here today?" "Answer: You did." "Question: And what did you respond?" "Answer: Well, you asked me if the people from SLED had asked me to come up here today, and I said, 'No,' that they hadn't." "Question: Had I talked to you previously about this trial?" "Answer: You did." "Question: Had I asked you previously if you were going to be here?" "Answer: You had." "Question: And what did you respond on those occasions?" "Answer: Not that I knew of." "Question: That you were not going to be here?" "Answer: Right."

A. Yes, sir, and I think that's exactly what I just said, wasn't it?

Q. All right, sir. Mr. Weatherford, did you find it necessary to conceal from everyone, other than law enforcement agents, your identity as an undercover agent, during the time you were employed by SLED?

A. You asked me if someone other than a law official knew of my employment with SLED?

Q. Right.

A. The gentleman who signed my bond knew, and I assume that the people in the insurance bonding agency knew.

Q. What about Mrs. Maybank? Did she know your identity as an agent prior to Mr. Bursey's trial?

A. No, sir, she did not.

Q. Now, you testified that you were a member, co-sponsor or co-chairman of this AWARE group. Did you express at these meetings any feelings in opposition to the War in Vietnam?

A. I don't recall having expressed any particular feelings at any time, no, sir.

Q. You didn't find it necessary, to maintain your cover, to say any particular thing at these meetings?

A. Nothing in particular, no, sir.

Q. Do you recall anything in general that you might have said about the War?

A. No, sir. Everyone seemed to assume that if you were present, you were, in fact, in sympathy with the causes being discussed, and that you were in sympathy in the same way that everyone else present was in sympathy, and there was never an occasion in which anybody would ever ask you, "Are you against the war?" People assumed that by your very presence, that you were.

Q. And there were discussions about the war, were there not, going on in the AWARE group and other places?

A. Everyone was so totally against the war, that there was no need to discuss whether they were in favor of anything or against it. There would be discussions about how to stop the war and such as that.

Q. And you participated in those discussions?

A. I was always present, yes, sir.

Q. I know you were present but did you also participate in the discussions?

A. Not generally, no, sir.

Q. Sometimes you did?

A. It's possible, but I can't think of a particular instance when I did.

Q. You testified that you had various other assignments as a SLED agent during this period of time that you were involved in Mr. Bursey's case. Have you testified—and I want to ask you about that—have you testified in any other trials other than Mr. Bursey's?

A. No, sir.

Q. Do you have any records which would allow me to reconstruct the level of your activity during the time you were employed by SLED as an undercover agent?

A. No, sir.

Q. Did you keep any records of where you were from day to day, what you were doing?

A. The only kind of records I ever kept were when I sent in expense forms, and that would, of course, have—I think it had the city I was in at any given time. That would be the closest thing.

Q. But there would be no way I could find out from an independent source precisely what you were doing during that period of time?

A. Not that I know of, no, sir.

Q. But you do know that you haven't testified in any other trials?

A. Yes, sir.

Q. Did any of these assignments you were given lead to arrests?

A. Yes, sir.

Q. Did they lead to convictions?

A. I'm inclined to say, "Yes, sir," although—yes, sir, I'm sure there were instances. I can't think of all the names of the people involved, because I think I said earlier, once we had the evidence, we really weren't very concerned with it after that.

Q. Were you ever told by anyone that you ought to keep a log or something, a day-timer?

A. No, sir.

Q. How would your superiors know what you were doing—just your verbal reports when you would go to the office every other week? That's the way they would keep tabs on you—and telephone conversations?

A. I was in a great deal of contact with some of the agents, such as Mr. Cook, who testified yesterday. I saw him rather frequently, and there were other agents out there that I saw more frequently than Chief and the hierarchy at SLED headquarters. Most of my contact was with people who were working out of headquarters.

Q. Now, when you were hired as a SLED agent, were you given any particular kind of general training? I know that you received certain instructions from Mr. Strom and others pertaining to your duties, but did you receive any general instructions about what an agent is supposed to do, as a general matter?

A. You mean in a formalized way, like in class, like going to the Police Academy or something?

Q. That's right.

A. No, sir, I didn't go to the Academy or a class.

Q. What about informal instruction—not classroom instruction?

A. Yes, sir. Well, in each case, I was always working with someone; so, from the beginning, you begin to learn in that informal way what it is you should and should not be doing; but that's, as I said, an informal manner.

Q. All right, sir. Did you ever have occasion to learn anything in a formal or informal manner from people that you worked with in the South Carolina Law Enforcement Division about about Fourth Amendment problems, that is, searches and seizures and what role officers were to play in searches and seizures, about warrants, probable cause?

A. There was a great deal of discussion of such problems in the public press and so—there was also a great deal of discussion at that time among law officers. There still may be, but not being with law officers that much, I don't know. There was a great deal of discussion constantly about the changing relationship between law enforcement officials and others.

Q. But did you have discussion with law enforcement officers about that aspect of the law?

A. In no formalized way, but I'm sure that it was often the topic of conversation when I was present or when I was participating, but there was no particular—I'll say no kind of classroom instruction.

Q. Did you regard that as a learning process, as far as you were concerned, these discussions with officers about those kind of problems?

A. Yes, sir.

Q. Yes?

A. Yes, sir.

Q. Do you recall discussing the rights of accused, such as whether or not law enforcement officers are required to give people warnings or say things to them before they interrogate them? Did you ever have occasion to talk to law enforcement officers about that aspect of the criminal law?

A. I'm not positive about any particular thing that we discussed. Since I wasn't ever involved in arresting people, that usually—I don't recall the topic coming—come up, and if it had, I probably wouldn't have paid that much attention, because my activities—I never arrested anyone, so—

Q. Are you finished?

A. Yes, sir.

Q. You have no recollection that anybody ever discussed with you the rights an accused might have as far as—well, let me just ask you that question—other than the Fourth Amendment problem we talked about, searches and seizures and warrants?

A. I've read a little paragraph that the law officers have to read. I was familiar with that.

Q. How did you become familiar with that?

A. That was a part of the general discussion. As I say, that could well have been brought up any number of times.

Q. What's the little card that you are talking about?

A. I don't recall the wording, but it informs any person that's been arrested of his rights. I have read that and I'm familiar with that.

Q. Are you referring to the so-called *Miranda* warnings?

A. I presume that's what it was.

Q. What did the card say? What rights, if you remember, do people who are accused of crimes have?

A. Right to counsel and have their counsel present during questioning; the right not to say anything.

Q. Did you know about this aspect of the law, this requirement of the law prior to Mr. Bursey's arrest?

A. I think that I knew about it probably prior to going to work for SLED. I think that the police had started

doing that a year or two before and it was in the newspaper; it was a topic of discussion.

Q. You knew then that people who were charged with crimes had the right to be represented by an attorney?

A. Yes, sir.

Q. Prior to becoming a SLED agent, were you ever—did your becoming a SLED agent have anything to do with any charges having been brought against you for violating the law?

A. No, sir.

Q. There was testimony as I recall, from Mr. Wise that he was under the impression that you had been charged with violating the narcotics law and that had something to do with your employment with SLED. You deny that is true?

A. Yes, sir.

Q. Have you, in fact, been convicted of any crimes?

A. No, sir.

Q. Can you tell me whether you have been arrested for crimes prior to becoming a SLED agent?

A. I worked with some people from SLED for a couple of months prior to becoming an agent, and during that time, I was arrested at least a couple of times. I was taken in. I don't think it was written up or I was ever technically charged, but, yes, I was taken in, even though I wasn't a commissioned agent at the time.

Q. So, your testimony is prior to your involvement with law enforcement agents as an undercover agent, you had no arrests for a violation of the law?

A. Yes, sir.

Q. Will you tell me about that?

A. That I had no arrests?

Q. Your answer is "Yes," you had no arrests?

A. I had no arrests prior to my involvement with the State Law Enforcement.

Q. Fine. I'm sorry. What sort of relationship did you have with Mr. Bursey prior to his arrest?

A. Mr. Bursey was very much involved with a number of things that went on in the Columbia area. I saw him frequently; he was at most demonstrations or large meetings

or any gathering of people of what was a thing called "radicals." So, I saw him rather frequently around town, the Coffee House, demonstrations at the University; and as I said, I have been to his home several times.

Q. Has he been to your home as well?

A. I think he came by—I remember one occasion in which he came by my house, yes, sir.

Q. Would it be fair to say that you had a personal relationship with him?

A. In the sense that if you spend that much time with someone, you certainly know more about them than just the aspects of your own job, but it wasn't—it's difficult to know how to respond to "personal." I mean, this kind of job exposed me to him in a personal way, I guess.

Q. You had shared interests and experiences? That's my own definition of a friendship.

A. Well, sir, having never—Mr. Bursey was, I believe, probably the first person that I had ever met who had the kind of philosophy that he did, and I'm not sure that there was much in our background or in our interests that was that similar.

Q. Do you recall, Mr. Weatherford, ever discussing the possibility of there being an informer in Mr. Bursey's case?

A. I beg your pardon?

Q. Do you recall ever discussing with Mr. Bursey or Mr. Wise the possibility of there being an informer, a Government agent in Mr. Bursey's trial?

A. Mr. Bursey brought up the subject, yes, sir.

Q. You did discuss that matter?

A. I listened to what Mr. Bursey said, and to my knowledge, Mr. Bursey was the only one who ever brought up the subject, and I would respond with, "I find it hard to believe," or "That's really strange." That was sort of my standard response. I wasn't going to agree; I wasn't going to disagree; I wasn't going to go into it at all. In a sense, I discussed it in the sense that I constantly would respond that "That's really strange," or "That's hard to believe," or "I can't accept that."

Q. By your response, did you intend to communicate to him the fact that you were an undercover agent?

A. Did I attempt to communicate to him the fact that I was?

Q. Right.

A. No, sir, I did not.

Q. Did you intend to communicate just the opposite?

A. Well, I intended just not to take a position on whether or not somebody else in the group was an undercover agent. He would name certain people, and my sole intention was not to take a position on it. I didn't want to agree with him; I didn't want to openly disagree with him without having any evidence to show him, so I would just be noncommittal and say that I found it strange or hard to believe.

Q. You wanted to maintain your own cover then?

A. I always wanted to maintain my cover, but I don't think that that was a primary interest in that particular intersection, though.

Q. Did you ever suggest that the third party, whom we don't know whether it was Mr. Merrick or not—or you don't recall whether that was his name—but whoever that third person was, do you ever recall suggesting that he might be an agent?

A. I never suggested that anybody at any time might have been an agent. I think that would have been the last thing that someone in my position would have done.

Q. Now, you testified, I believe that you—that prior to Mr. Bursey's trial, you had discussion with Mr. Foard about Mr. Bursey's trial? Is that correct?

A. That I had not had discussion?

Q. That you did have a discussion with the prosecutor prior to Mr. Bursey's trial?

A. I don't recall, no, sir.

Q. Didn't you testify that you talked to him prior to the trial?

A. I saw him the morning of the trial. He came to the office and I stood up and shook hands and said, "How are you this morning," something to that effect and walked by.

I mean, maybe you are thinking of another instance that I'm not thinking of. I don't recall—

Q. Well, I'm referring to that instance. That was prior to trial and you had conversation with the prosecutor.

A. I spoke with him that morning, yes, sir.

Q. Prior to the trial?

A. About ten minutes, yes, sir.

Q. And you actually spoke to him on two occasions prior to the trial, did you not? They both took place the same morning, but they were two separate occasions? Isn't that your testimony?

A. Prior to the trial?

Q. Yes.

A. I don't recall. I only recall seeing him that one time, and that's just when he spoke to me, and we went to Court together.

Q. Do you recall whether or not you had a discussion about whether you were properly dressed or not?

A. Yes, I think that's what I asked him. I had on blue jeans at the time, and I think he said, "Hello," and we shook hands, and I said something to the effect, "Do you want me to go to Court like this," or "Is this the proper dress," or something to that effect.

Q. You didn't discuss your testimony at that time?

A. No, sir.

Q. And he didn't tell you you were going to testify at that time?

A. No, sir.

Q. All right, so he must have told you that you were going to testify at another time? Is that correct?

A. No, sir.

Q. Weren't you told that you were going to testify by Mr. Foard? Wasn't that your testimony?

A. I don't recall Mr. Foard mentioning it, no, sir.

Q. How did you know you were going to be a witness?

A. I think either Chief or—either Chief Strom or Mr. Cook said that someone in the office brought the subject up. I don't recall which one. There were several people present in the office that morning, and as to which one first brought

it up, I don't know. I don't think it was Mr. Foard, from the mere fact that Mr. Foard just walked through one time, spoke to me quickly and was gone again.

Q. This was the occasion you talked about your clothes or was this another occasion?

A. It was all at the same very quick intersection. He was racing through the room that I was in, to get to his office, I believe, and he just paused long enough to shake my hand and speak to me, and I quickly asked him that one question, and he took off back to his office.

Q. And you don't recall ever talking to him again?

A. Well, sir, we went to Court, and, of course, I was questioned by Mr. Foard; probably talked to him after that. I don't know.

Q. On Page 124 of your deposition, you are being questioned by counsel, "Question: Approximately how long did you and Mr. Foard talk?" "Answer: It was just a quick meeting, and I asked him that question, and I believe that was all." "Question: And then what happened after he told you that you were dressed fine?" "Answer: I believe he left for a few minutes." "Question: And what did you do?" "Answer: I continued to wait with the other people." "Question: How long did you wait before you went to court?" "Answer: It was just a few minutes after that he came back, and I think we all left to go to court." "Question: When he came back after that, did he say anything to you about whether or not you would testify?" "Answer: I don't recall. Either said, 'Yes, we do want you to testify,' or he said, 'I think we are going to need you,' or something possibly like that, but I don't recall any particular statement."

Do you recall that testimony and does that answer—

A. Yes, sir, in other words, after he spoke to me, and I asked him about my clothes, he walked into his office; we waited perhaps ten more minutes; he came out and headed for the courtroom. As he did, we all went together. And, as I said, I don't recall him saying anything on the way, but it's possible that he did. I think in the deposition I said, "I don't particularly recall what he said, if he said anything directly to me," but it's possible that he did.

Q. You don't recall whether, as a result of anything he might have said or anybody might have said at that point that you understood that you would be a witness?

A. From anything that Solicitor Foard said?

Q. That's right.

A. No, sir. There was—I—he didn't say anything about the case whatsoever to my recollection.

Q. And your recollection is that he said nothing about your being a witness on that second occasion that you met with him, if I am dignifying that brief coming together by calling it a meeting?

A. I think by then I already knew that I was going to be. At least, I knew I was going to Court, and I guess there was no question at that point. I'm not sure. I don't think there was any reason for him to say, "Well, look, you are going to testify," or "You are not." I think I already knew. I at least knew I was going to Court, and I think I already knew that it was to testify.

Mr. MCDONALDS All right. Thank you, Mr. Weatherford.

Mr. COLEMAN: I have nothing further.

By the COURT:

Q. Mr. Weatherford, at the time of the break-in, you were a student at the University?

A. I was a part-time student, yes, sir. I wasn't in a degree program.

Q. You were part-time—were you going at night, daytime or what do you mean by part-time?

A. Both. I was taking night courses off and on. I'm not sure that particular quarter—that particular semester if I had night courses, but off and on, I was taking night courses and day courses. I wasn't taking a full load, because I wasn't in a degree program. I had a degree in Political Science, and I was interested in changing over into another field, and I wanted to take some background courses before applying for graduate school in the other field.

Q. All right, now, was Mr. Bursey in the regular academic college too? Was he attending the University?

A. I don't believe so. I'm not sure.

Q. Where did all these meetings, these AWARE meetings take place—on the University campus or somewhere else?

A. Usually on the University campus, yes, sir; sometimes at a residence.

Q. Where would they meet at the University?

A. In the Russell House is the only place I recall meetings. I think that was the only building.

Q. All right, if you weren't attending the University regularly and Mr. Bursey wasn't attending at all, how often did you see one another?

A. Mr. Bursey may have been attending or taking courses. I'm not sure, but he was at the University a great deal. I did see him at school a fair amount.

Q. You didn't go to class with him?

A. No, sir.

Q. When you say you saw him a "fair amount," you mean you saw him every week, every day or two? How often did you have these AWARE meetings?

A. I think AWARE met every other week, but there were meetings of all kinds. There were so many different organizations, and it was basically the same people in all of them, that it's difficult to recall which meeting belonged to which organization; but particularly during the whole UFO trial, in that period, a number of groups were formed, and it was basically the same people, and they were meeting probably about every other day. As for AWARE itself, I think AWARE met every other week.

Q. So you would see him during this period of time every other day?

A. Unless I was out of town or he was.

Q. Now, after the arrest, did you continue to see him that frequently?

A. Yes, sir, except that I was out of town more often during that particular time. It just so happened that I was being sent out of town more. So, as I testified, I was on vacation at Hilton Head, and Mr. Cook testified yesterday that we had done some work together at Myrtle Beach. I had also taken a quick trip to Atlanta. I think during that time, I was working in Anderson County or Greenville. I

was out of town more often, in part because it was summer and—or was the close of school, and I had an opportunity —it was easier for me to go out of town, and there were more people, say, in the area of the beach and Charleston and Myrtle Beach and those places; so I worked out of town more. But when I was in town and when he was in town, I probably saw him with about the same frequency that I had seen him during the school year.

Q. These meetings, were they held, regardless of the name of the group—the same group of people, you say—were they held at some place on the University campus?

A. Once the UFO situation started developing, with that trial, there was a tendency to have more and more at a private residence, so they—I think during that time, they had fewer meetings. I think some of the organizations were possibly banned from the Russell House.

Q. How did the word get around as to where everybody was meeting?

A. By phone or—so many people lived together that they could—communication flowed rather quickly and easily, and the few people who didn't live with anybody that was connected with it could either be phoned or they would see somebody at school and hear about it.

Q. How many meetings did you have, whether you refer to them as social or otherwise, with Mr. Wise prior to the trial and after you knew he represented Mr. Bursey?

A. All total, I may have seen him four times.

Q. This includes social affairs?

A. ACLU party, party the night before the trial.

Q. The night before the trial was the night he suggested—or two nights before the trial—the night that he suggested that you not be in the courtroom?

A. Yes, sir.

Q. Have you ever discussed with him—now you testified regarding statements made by the plaintiff regarding an informant; did you ever discuss with Mr. Wise the possibility or did he bring up the possibility of an informant?

A. I don't believe he did, but I can't swear that he didn't. I don't recall. I recall Mr. Bursey bringing up the

subject, but I do not recall Mr. Wise bringing it up, nor do I recall Mr. Bursey bringing it up in Mr. Wise's presence.

Q. What was said about this other person, Merrick, who was supposed to have been with you and Mr. Bursey, about whether he would be there to testify or what he might say or anything about him?

A. Not to my recollection, no, sir.

Q. You don't recall any discussion along that line?

A. No, sir, just that Mr. Bursey thought that Mr. Merrick was an informer at one point, and I had to take a position on that, and I think that's the only discussion that ever came up.

Q. Did they ever tell you that they thought he was out of the country and wouldn't be available to testify?

A. No, sir, I didn't know that.

The COURT: Any further questions?

Mr. MCDONALD: Your Honor, may I ask the witness what his present employment is? I meant to ask him.

The COURT: He said he goes to the University of California and he's working on a graduate degree in Anthropology.

The WITNESS: Yes, sir.

By Mr. MCDONALD:

Q. Do you have any gainful employment?

A. I am supported by fellowships.

Q. But you have no other—you have no job, nobody is paying you to do any work?

A. During the school year, I am a teaching assistant; but during the summer, I have fellowships.

Q. You are not presently working for any law enforcement agency?

A. No, sir, I am not.

The COURT: You may come down.

Mr. COLEMAN: That's the defendants' case.

The COURT: Anything in reply?

Mr. MCDONALD: One moment, Your Honor. That's all for the plaintiff.

The COURT: Let me make sure I have all the exhibits.

(Discussion.)

The COURT: Gentlemen, I'll take the matter under advisement and let you have an order as quickly as possible.

(Parties to file briefs.)

(Case concluded.)

REPORTER'S CERTIFICATE

I hereby certify that the aforegoing is a true and correct transcript of proceedings had in the within case at the stated times and place.

I hereby certify that the aforegoing is a true and correct transcript of proceedings had in the within case at the stated times and place.

MIRIAM S. HENRY,
U. S. Court Reporter.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND.

Plaintiff's Exhibit (1)

AFFIDAVIT

PERSONALLY APPEARED C. RAUCH WISE, who, being duly sworn says that he is a member in good standing of the South Carolina Bar and that he represented Mr. B. A. Bursey on the charge of malicious destruction of real property in the General Sessions Court for the State of South Carolina, County of Richland, on the 27th day of July, 1970.

The affiant further states: I was first contacted by Mr. Bursey by telephone on March 31, 1970. I agreed to represent Mr. Bursey on the charge of malicious mischief and filed a request with the court for a preliminary hearing on April 1, 1970.

I first met with Mr. Bursey in my office in Greenwood the first week of April, 1970. We discussed various aspects

of the case, my fee, and the filing of a motion for discovery of informants.

During the third week of April, 1970, I made a trip to Columbia for the purpose of meeting my client's co-defendant, Mr. Jack M. Weatherford, and other possible witnesses. Mr. Bursey, Mr. Weatherford, and myself met at Mr. Bursey's house in Columbia off Leesburg Road. We discussed every aspect of the case and dwelt at length on the probability of there being an agent involved in the incident. Mr. Weatherford offered the opinion that Mr. Greg Merrick, an unindicted participant in the incident, could be the agent. Mr. Weatherford related details of his arrest, his incarceration, and his subsequent retention of Mr. Frank Taylor as his defense counsel.

I later met with Mr. Taylor and his assistant Mr. Jim Spruill and discussed defensive knowledge and tactics, and the probability of there being an agent involved in the incident.

I met with Mr. Weatherford numerous times, both socially and in my capacity as defense counsel for Mr. Bursey. On occasion when I was in Columbia and unable to contact Mr. Bursey, I would contact Mr. Weatherford. During the four months between my client's arrest and trial, I came to know and trust Mr. Weatherford and felt that my confidence was well placed.

On the weekend before the trial I met with Mr. Bursey and Mr. Weatherford at Walker Maybank's house. I asked Mr. Weatherford if he had been contacted by any law enforcement agency in regards to the trial. Mr. Weatherford said he had not been contacted and assured me that he would not co-operate with any agencies involved in the prosecution. I asked Mr. Weatherford if the fact that his brother was then serving a prison sentence could be used to coerce his co-operation with the prosecution; Mr. Weatherford again assured me that he would under no circumstances co-operate with the prosecution. I expressed my relief to Mr. Weatherford that he would not testify for the state as he was the only witness who could place Mr. Bursey at the scene of the incident. This crucial point of the defense was made clear to Mr. Weatherford.

Up to the morning of the trial. I still did not know the identity of any possible informer or agent. A defense motion for discovery of agents or informers was denied just prior to trial by the Honorable G. Badger Baker, presiding Judge. The first witness called by the state was Mr. Weatherford, at which time Mr. Weatherford revealed his employment by the State Law Enforcement Division for the previous year as a salaried agent and informer. Such revelation took me by surprise and my ability to intelligently question Mr. Weatherford and indeed my ability to conduct an adequate defense was substantially impaired.

After my client's conviction, I advised him that there was no merit in appealing; I heard my opinion on my estimate of the prevailing law on the presence of police agents as prejudicial error in a state criminal proceeding.

/s/ C. RAUCH WISE,
Attorney at Law.

SWORN TO before me this
8th day of October, 1973.

/s/ HERBERT E. BUHL, III (L. S.)
Notary Public.

My Commission Expires: 4/24/83.

Plaintiff's Exhibit (2)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA

IN THE MAGISTATE'S COURT

THE STATE OF S. C.

vs.

BRETT ALLEN BURSEY

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS

Preliminary Hearing before Hon. H. E. Watts, Magistrate for Richland County, in the City of Columbia, County of Richland, State of South Carolina, beginning at the hour of 10:00 A. M. on the 13th day of April, 1970.

APPEARANCES: Edmund Monteith, Esq., Asst. Solicitor, 5th Judicial Circuit, on behalf of The Same.
C. Rauch, Esq., Jefferies & Groves, Greenwood, S. C., on behalf of The Defendant.

[Transcript of Record of the Preliminary Hearing, pages 3-16.]

Mr. MONTEITH: If Your Honor Please, this is two cases: *The State v. Brett Allen Bursey,* it is a Warrant for violation of Section 10-147, or the section that makes it illegal to have a tear gas gun or a machine, that is the first warrant,—I think you have seen it?

Mr. WISE: I've got a copy.

Mr. MONTEITH: And the second is *The State v. Brett Allen Bursey and Jack M. Weatherford.* It is an Arrest Warrant for malicious injury to real property and malicious injury to personal property. As I understand it counsel here, his clients are not present, but he would like to read into the record—oh, Mr. Bursey has come in, let the record show then that Brett Allen Bursey is present. Do you represent Jack Weatherford?

Mr. WISE: No, sir.

Mr. MONTEITH: Then this is a Preliminary Hearing on Brett Allen Bursey alone. Is that correct?

The COURT: Yes, that's right.

Mr. WISE: I'm sorry?

Mr. MONTEITH: You represent Bursey only and not Weatherford?

Mr. WISE: That's right.

Mr. MONTEITH: Do you want to state for the record the fact that you represent him, and just that you represent Bursey?

Mr. WISE: My representation is only of Mr. Brett Allen Bursey on these three charges and not of Mr. Weatherford in the Preliminary Hearing for the purposes of determining probable cause.

Mr. MONTEITH: Does your client understand the charges against him?

Mr. WISE: Yes, sir.

Mr. MONTEITH: The State is ready to proceed.

The COURT: All right, go ahead.

Mr. MONTEITH: I'd like to call Mr. Collins. Come around, please.

WHEREUPON:

Donald H. Collins, without being duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. MONTEITH:

Q. Coloniel Collins, I believe you are Donald H. Collins?

A. That's right.

Q. You are the Director of Selective Service for the State of South Carolina?

A. That is correct.

Q. And as such Director, is the local draft board's facilities, its building, under your supervision and control?

A. The offices within the building are under my supervision and control.

Q. The premises are at what address?

A. 1710 Gervais Street in a building known as The Romer Building.

Q. On the 20th day of March, 1970, were they located in that building?

A. That is correct.

Q. Were they under your control at that time?

A. That is correct.

Q. On that particular day did something happen to the premises?

A. I was called by my office at approximately 8:30 and informed that the Executive Secretary of the local board had called the state headquarters and informed the young lady that answered the telephone that there had been some vandalism within the office and that the F.B.I. had been notified and I told them that I would go by the building on the way to the state headquarters that morning, which I did.

Q. When you arrived what did you find, Colonel?

A. I found that the clerks of the office were standing in the corridor outside and inquired as to what damage had been done. They said they did not know. When they opened the door they saw that there had been trouble so they immediately closed the door and waited on someone to come.

We entered the office and knowing the F.B.I. had been notified we didn't touch anything, but we could see that there was red paint or some red liquid over the floor, on the draperies of the window in the office, and glass fragments were all over the floor.

Q. Was the damage to the premises more than Fifty Dollars?

A. Well, I'm not an expert in these matters but I would say it would be considerably more, I would say in the hundreds probably.

Q. When the F.B.I. arrived I believe that a note was found, is that correct?

A. That is correct. It was attached to a brick.

Q. Now, Colonel Collins, I'm going to hand you this—

Mr. MONTEITH: Judge, I would like for The Court to rule, in examining this I would like for this to be retained in this envelope. I would not like for it to be handled except as I am handling it, from the corners, and we introduce it so that it might be seen. You notice it is in a clear plastic

envelope in which it is sealed. If The Court would like to examine it before I offer it I would be glad for you to do so.

The COURT: Is there any objection to this?

Mr. WISE: (Examining) No objection.

Q. Mr. Collins, is this the note you saw there on the brick?

A. (Examining) It is.

Q. It is the note?

A. That's right.

Mr. MONTEITH: Thank you, Mr. Collins. That's all the questions I have of Mr. Collins.

CROSS EXAMINATION

By Mr. WISE:

Q. Mr. Collins, do you know whether a bill has been received to repair this damage that has been done?

A. I do not.

Q. Is your estimation of damages solely on your observation on it and not based on an estimation?

A. I base it strictly as a layman, what it would cost me to replace drapes in my office and whatnot, what I paid for them myself.

Q. Were the drapes replaced?

A. I have no idea.

Q. So then your observation of it that one morning is what you base your estimate on?

A. That's correct.

Mr. WISE: Nothing further.

Mr. MONTEITH: I'd like to excuse Mr. Collins if I might.

The COURT: Mr. Monteith, I forgot to swear Mr. Collins. Would you ask him to come back.

Mr. MONTEITH: Col. Collins, would you just come back for a moment, I want to ask you one or two more things and he wants to swear you in?

WHEREUPON:

Donald H. Collins is duly sworn.

Mr. MONTEITH: The testimony which you have just given, Colonel, is it true?

A. Yes, it is, to the best of my know.

Mr. MONTEITH: Do you have any further questions?

Mr. WISE: No.

Mr. MONTEITH: Now you can go. We'd like to call Mr. Finney, please.

WHEREUPON:

William Burt Finney III, being duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. MONTEITH:

Q. Mr. Finney, I believe you were just sworn, is that correct?

A. I didn't make a statement.

Q. But I believe you were sworn, is that right? What is your age?

A. 19.

Q. Where do you go to school?

A. Clemson University.

Q. On the 20th day of March 1970 did you meet one Brett Allen Bursey?

A. Yes, sir.

Q. Do you recall the approximate time that you met him?

A. It was between ten and twelve on the 19th.

Q. You met him on the 19th?

A. Yes, the night of the 19th.

Q. Would you tell us without going into a whole lot of detail about what you did, but can you tell us if you have any recollection or any memory of a note?

A. Yes, sir.

Q. Tell us about that note, please, sir?

A. Well, after I was informed of the plan of Brett and some others they had me copy a note that he had written.

Q. Who had written the note?

A. Brett Bursey.

Q. And who asked you to copy the note?

A. I believe it was Brett.

Q. Now I hand you this and ask you to handle it as I am handling it and see if that is the note that you yourself wrote, or copied?

A. (Examining) Yes, it is.

Q. And you copied that note at the request of who?
A. Brett Bursey.
Q. Had you known Brett Bursey before the 19th?
A. No, sir.
Q. Do you see him in the courtroom today?
A. Yes, sir.
Q. Point him out if you would.
(Witness complies.)
Q. Did Brett tell you his plans or the purpose of this note?
A. Yes, sir, he did.
Q. What did he tell you?
A. He said they had planned to throw bricks through the Selective Service Office, and paint.
Q. When you finished copying the note that he had prepared onto a sheet of paper, which you have identified, what did you do with it?
A. I gave it to one of the others, I don't recall which one.
Q. Was Brett with them?
A. Yes, sir, he was in the room.
Q. And after you copied it, did you learn what the purpose of the note was, or did you know at the time you copied it?
A. I knew at the time I was copying it.
Q. Brett had told you the purpose?
A. Yes, he had.
Q. What else did you see Brett do other than write a note and have you copy it? What else took place at the house that night?
A. They merely gathered some bricks and paint and left, and then they returned, and that was all—just some talking.
Q. Gathered some bricks and some paint?
A. Yes, sir.
Q. Do you remember what color paint?
A. I believe it was red.
Q. Now, you say they gathered it, who does that include?
A. Bursey and three others.

Q. Includes Brett Bursey?
A. Yes, sir.
Q. And you saw them leave with it?
A. No, sir, not actually leave the room. I noticed that after they were gone it was gone.
Q. Brett Bursey had it as far as you know when he left?
A. Yes, sir, I suppose.
Mr. MONTEITH: No further questions. Any questions, Mr. Wise?

CROSS EXAMINATION

By Mr. WISE:
Q. You didn't see Mr. Bursey leave with it?
A. No, I didn't.
Q. Did you know if they ever went to the draft board?
A. Not definitely.
Q. All you know is they sat around and talked about it?
A. Right.
Q. As far as the actual execution of any plans they drew up there, you don't know whether they did them or not?
A. Not whether they accomplished them.
Mr. WISE: That will be all, unless he has another question.
The COURT: Do you have any other questions to ask him?
Mr. MONTEITH: Just a minute. No further questions. You may come down.
Come around, Mr. Clark.

WHEREUPON:

T. E. Clark, being duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. MONTEITH:
Q. Mr. Clark, I believe you are with the Richland County Sheriff's Office?
A. Yes, sir, that's correct.

Q. And did you on the 20th day of March 1970 arrest Mr. Bursey?

A. Yes, sir.

Q. And incidental to that arrest did you search him, sir?

A. I did.

Q. And did you find anything unusual?

A. Yes, sir. A tear gas cannister.

Q. Is that it (indicating)?

A. Yes, sir.

Mr. MONTEITH: We offer this in evidence.

Mr. WISE: No objection.

Q. Mr. Clark, I ask you to read, beginning of the second paragraph, does it make reference to what is contained in it?

A. Yes, it says "Self defense tear gas weapon."

Mr. MONTEITH: We offer this in evidence without objection.

Q. You found this on his person?

A. Yes, we did.

Mr. MONTEITH: No further questions.

CROSS EXAMINATION

By Mr. WISE:

It says in the warrant that Mr. Bursey did possess—well, first of all, this is a tear gas gun?

A. Yes, sir, I would say so.

Q. It is not a machine?

A. I would say it is both.

Q. The warrant reads "tear gas machine, gun, and parts", which indicates an arsenal was found on Bursey's person.

Mr. MONTEITH: If your Honor please, what the warrant indicates—this is a witness, he can only testify as to what it is.

Mr. WISE: That's what I'm trying to figure out, whether it is a machine, parts, or all.

Mr. MONTEITH: It could very well be all.

Mr. WISE: Well, I'm just trying to clarify whether they consider it a gun, a machine, or parts thereof, and which one he particularly thought it was.

Q. You would classify it as a gun?

A. I would classify it as all of them.

Mr. WISE: That's all.

Mr. MONTEITH: That's all the State has, if your Honor please.

Mr. WISE: That's all of this witness?

Mr. MONTEITH: No, that's all I intend to offer.

The COURT: That's all of the State's case.

Mr. WISE: Then, your Honor, I'd like to move that the charges against Mr. Bursey be dismissed on the grounds that the State has not proven that Mr. Bursey—or proven probable cause for the arrest of Mr. Bursey for actually throwing the paint through the window or throwing the brick through the window. They have produced no witnesses or evidence of that fact. They have produced witnesses and evidence of the fact he contemplated doing it, but none of the fact the act was actually carried out.

Mr. MONTEITH: We have, of course, shown probable cause. Mr. Clark established that a crime actually took place. Mr. Collins, by his own testimony, proved that a brick was thrown through the window. We have produced the note that Mr. Bursey has drawn up. And it certainly is a case of probable cause.

The COURT: Your motion is denied. I find probable cause in this matter, and will bind it over.

Mr. MONTEITH: You are binding the matter over, then, Judge?

The COURT: Yes.

Mr. MONTEITH: I will just take the warrants with me then.

The COURT: You take the bond along too.

(At this time the hearing was adjourned.)

REPORTER'S CERTIFICATE

This is to certify that I, Dorothy H. Badger, am a duly qualified Court Reporter; that I was employed by the Court to make a verbatim record of the testimony in the foregoing proceeding; that I made such a record and reduced the same to typewriting; and that the foregoing fifteen (15) typewritten pages is a true, accurate and complete transcription thereof to the best of my skill and ability.

/s/ DOROTHY H. BADGER,
Court Reporter.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

Civil Action No. 73-665

BRETT A. BURSEY, PLAINTIFF,

versus

JACK M. WEATHERFORD *et al.*, DEFENDANTS.

DEPOSITION OF J. P. STROM

Deposition of J. P. STROM, taken on behalf of the Plaintiff, before Irene H. Smith, a Notary Public in and for the State of South Carolina, at SLED Headquarters, Broad River Road, Columbia, South Carolina, commencing at 2:35 P. M. on Wednesday, March 13, 1974, pursuant to Notice of Taking Deposition.

APPEARANCES:

LAUGHLIN MCDONALD, ESQUIRE, Attorney for Plaintiff; HERBERT E. BUHL, III, ESQUIRE, Attorney for Plaintiff; JOSEPH C. COLEMAN, ESQUIRE, Deputy Attorney General, and TRIVA ASHWORTH, Assistant Attorney General, Attorneys for Defendants.

IRENE H. SMITH,
Reporter.

Plaintiff's Exhibit (3)

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[From Deposition of Strom, Pages 9-22]

A. Catch the pushers, that's right.

Q. Catch the people who have a predisposition to make a sale?

A. That's right, throughout the United States, so far as I know.

Q. Can you tell me—let me direct your attention now, if I may, to Jack Weatherford. I believe he was employed as an agent by the Law Enforcement Division?

A. Yes, sir.

Q. Was he employed as an undercover agent?

A. At first; all of his first assignments were undercover.

Q. Can you tell me how he was recruited by the South Carolina Law Enforcement Division?

A. As far as I remember, and some of these things I've got to get based on—as far as I know, the first time I heard of Jack Weatherford was through Sonny Clark, a deputy sheriff in Richland County.

Q. What connection did Mr. Clark have, other than the fact that he was a law enforcement officer?

A. You know, I don't know all his connections. You'd have to ask him, because I can't speculate on that. As far as I remember, that was it.

Q. His name first came to your attention through Mr. Clark?

A. As far as I remember, that's right. When you talk to Jack Weatherford, he might could tell you different. It may not be exactly right, but that's the way I remember it.

Q. How was Mr. Weatherford actually recruited by your office?

A. Well, I'm sure I talked to him. He was a student at the University, and I think we started paying him on December 1st, 1969, and we quit paying him on September the 1st, 1970. I think he's in California now.

Q. When you first heard of Mr. Weatherford through Officer Clark, did you resolve to recruit him and did you get in touch with him?

A. That part, I can't remember the details. I knew I was interested, because he was in a position to furnish me certain information that was necessary for me to know.

Q. And what was that information?

A. Because he was down at the University, and at that time we were having problems. It was necessary for me to know what was going on, to make the campus safe and the buildings safe and so forth.

Q. Had you asked Mr. Clark to be on the lookout for somebody who you might be able to recruit? Do you recall?

A. I don't remember that. The way I remember it, that introduction was through Mr. Clark, but I'm telling you I'm not certain about that; I think that's right. I think I had met Mr. Weatherford, you know, sometime prior to this. He can tell you. He would remember it.

Q. Would it be a usual procedure for you to do the recruiting of these undercover agents, or would you delegate that responsibility to someone on your staff?

A. I recruit them, and other people do, too. It just depends on where you are and what the need is at the time.

Q. Can you tell me, as best you recall, what the substance of your conversations with Mr. Weatherford were, what you told him and what instructions you gave him?

A. During that time there was disorder on the campuses—

Mr. COLEMAN: Would counsel more clearly identify the time period in question?

Mr. MCDONALD: Yes.

By Mr. MCDONALD:

Q. What time did you talk to Mr. Weatherford, Chief Strom?

A. It was between December the 1st, 1969, and September of '70.

Q. You would have had this conversation about which I've just asked you prior to December 1, 1969?

A. I would think so, yes, sir. I don't know the dates, though, really, but if we started paying him then I must have talked to him.

Q. Pretty close to that date, you think?

A. Yes. I'm not narrowing it down to it, because I don't remember.

Q. What sort of conversation did you have with him? What did you tell him, and what instructions did you give him?

A. My main interest was to know what was happening at the campus, and if anything was going to happen, any violation of the law, approximately how many people would be involved and what their plans were, so I'd know how to plan, so we'd know how many policemen we would need to cope with the situation. And that was our main interest.

Q. The conversations you had with Mr. Weatherford, this would have been following the so-called demonstrations after Kent State, involving the Administration Building at the University and General Westmoreland's speech there at the Law School?

A. I don't remember when that was. I know they were having demonstrations down there.

Q. And the big sit-in at the Russell House. Would this have been about the same time you talked to him?

A. I don't remember those dates. I'm just giving you the dates that I know and what he was doing for me, as best I remember.

Q. But your contact with him related to those various demonstrations that I've talked about, at the University?

A. I don't remember it going through my mind, any particular incident. I wanted general information, because we're in charge of security for state-supported institutions, such as the University of South Carolina, Clemson, The Citadel, Ports Authority, and things like that.

Q. Were your instructions to Mr. Weatherford any more specific than you've related them to me?

A. I think that was just about it. Sometimes he'd give me a call or contact me through somebody else and tell us they were going to demonstrate the next day, and we'd want to know about how many people, and we'd make arrangements.

Q. Did you tell him that you were interested in people who were planning to break the law, and if so, were there any specific laws that you were concerned about, or did you just give him a general commission?

A. General; I didn't have any particular person on my mind whatsoever. My only interest was to protect the innocent and keep the University where it could operate.

Q. Did you tell him to keep an eye out on any specific individual, such as Brett Bursey, for example?

A. If I ever told him to specifically watch Brett Bursey, I don't remember it. I mean it may be possible.

Q. Did you tell him to try to find out information on any specific groups of people, as, for example, the B'nai B'rith chapter, or the AWARE group, or any politico-social group?

A. As far as I remember, I didn't tell him to do those things. He knew pretty well what was going on, and my main interest was what their plans were and when they were going to do it.

Q. Of any particular groups of people?

A. You know, where there was any threat or violation of the law.

Q. And you anticipated that the AWARE group would be one of the groups that he would try to keep tabs on, if he could?

A. I figured he would, but I don't know whether we discussed, whether I told him to especially keep tabs on AWARE. I wanted him to keep tabs on everything, really.

Q. Did you regard Brett Bursey as one of the individuals who any agent ought to check up on who was discharging this kind of surveillance for you?

A. Yes, sir, because he admits he was the organizer.

Q. I think you answered these questions. Your statement was that you don't remember that you ever discussed Bursey specifically with him?

A. Oh, yes, I'm sure I discussed Bursey, but I didn't point him out. You know, after the events, and you finally get around to the draft board, what we're talking about, his name came up then and maybe prior to that time.

Q. Do you think his name came up during this session during which you gave instructions to Mr. Weatherford?

A. If it did, I don't remember.

Q. But you did discuss Mr. Bursey at some point during the time Mr. Weatherford was employed?

A. Oh, yes.

Q. Now, will you tell me as best you can remember what kind of conversation you had about Mr. Bursey?

A. As far as I remember, it was about the draft board. Mr. Weatherford can tell you by far a whole lot more than I can, because I didn't keep notes. The main thing I was interested in when I started out, I think, was more or less crowd control and knowing how to cope with it.

Q. You got information from Mr. Weatherford that there was to be a raid on the draft board? You mentioned the draft board.

A. Yes, sir.

Q. Do you recall when you first got this information?

A. I've got two statements here you're probably interested in.

Q. All right, sir.

A. Why don't you just read them and put them in the record, if you'd like to.

Q. All right, sir. (Examines documents.) You've handed me an affidavit of Mr. Billy Finney. I believe he was called to testify at Mr. Bursey's trial, was he not?

A. Yes, sir.

Q. And I see you've also handed me an affidavit from a Mr. Daniel Thomas Bolding; I believe he did not testify at the trial. Is that right?

A. I don't see that in the record here.

Q. Do you recall how many conversations you had with Mr. Weatherford about Brett Bursey during this period of time that he was employed as an undercover agent?

A. No, sir, I don't recall how many, because, you know, most of mine was he called me on the telephone. I'd seldom see him.

Q. Would it be, for example, more than a dozen, or less than a dozen, or more than six?

A. Actually, I don't know, really. I talked to him about Bursey I don't know how many times.

Q. Would it be fair to say that—

A. I'm not going to say it would be fair when I don't know.

Q. Would it be more than once?

A. More than once, yes.

Q. And more than two or three times?

A. It was probably more than two or three times. I don't know how many times.

Q. Did you have any sort of understanding about how Mr. Weatherford was to report to you—that is, whether it would be periodically, on Monday of every month, or any routine?

A. No, he would report when—he knew how to get in touch with me. He had my office number, he had my home number; anytime he wanted to contact me, no problem.

Q. And if you didn't hear from him for a long time, you would have called him, or would you?

A. I wouldn't get excited. You'd know pretty well what was going on. If anything bad was going to happen, he'd let you know anyway.

Q. So the procedure was that he would contact you on the telephone whenever he had something to relate?

A. That's pretty near correct, I think.

Q. Did he understand that he could contact—did you tell him always to contact you, or did he have the authority to contact one of your lieutenants, for example, or somebody else in the office?

A. I'm sure he must have known some lieutenants; he could have contacted anybody with the office if I'd been out of town.

Q. Do you know whether or not he did that?

A. I don't know whether he ever contacted Captain Gasque or anybody like that, but he will remember when you talk to him, and he'll tell you the truth.

Q. Was any record kept of these reports that he would make?

A. I didn't keep any records at that time, because he was reporting to me on the telephone, and, you know, no

big deal. When we got the information about the draft board we picked these boys up and they gave us statements, and as far as I was concerned that's all we needed.

Q. Now, the statements that you're referring to the affidavits of Mr. Bolding and Mr. Finney, these statements were taken after the incident at the draft board?

A. Yes.

Q. You stated that you had a policy at that time—I think I'm quoting you correctly—not to make any records of these reports which Mr. Weatherford would make to you?

A. He didn't make a statement. His testimony is here, but I didn't take his statement on this. As far as I was concerned in the preparation and trial of the case, we had sufficient evidence with these witnesses, with Bursey. That's all I was interested in. I mean with Weatherford, not Bursey.

Q. When agents are on assignment and they call in, is it the policy now not to make any record of that call or report?

A. Well, if you've got a man working on a murder case where it's necessary step by step to know who you talk to and coordinate and things like that, we'd naturally make a record. I mean some things are not worth making a written report, and some things you don't want to, say, blow a man's cover.

Q. In those instances where an agent or an undercover agent makes a record, or where a record is made in connection with his activities, who would normally do the recording? Would the agent himself make the record, or would someone here make it?

A. It would depend on where and what was happening. Sometimes they come here, and sometimes they make their own reports. Yesterday we took statements in a murder case. We brought the people back from Detroit to this office and took them, took statements just like this. We haven't written up a whole report about everything that happened. But when we go to court, you rely on the evidence you have. Of course, I never have been one to go

into a whole lot of record business, because I never have thought it was necessary, and we don't have the time. It's too much a waste of time, really.

Q. Are there any standing instructions or manual of procedures which is in existence, detailing how the Law Enforcement Division agents or undercover agents are to discharge their duties?

A. Yes, sir. We have our instructions for them not to implant thoughts and suggest any type of violation. Their instructions are for them to be available and let other people talk in front of them. You can listen and then furnish the information to us. That's been held legal by courts year after year.

Q. Do you have a manual, written manual?

A. No, sir.

Q. Are there any policies or procedures?

A. We don't write a manual on procedures.

Q. How is an agent oriented about how to go about his duties?

A. Verbally, and we send them through the academy, in-service training with senior agents. We send them through the FBI National Academy, at Louisville.

Q. Do they get any information or data there dealing with making reports of their investigations?

A. Yes, sir. All schools, I would think, have some report writing.

Q. So that's a part of the duties as an agent or an undercover agent, to have some—

A. No, not as an undercover agent. You have very little reporting, because he doesn't have any identification.

Q. Would an undercover agent ever have occasion to do reporting, keep records or notes?

A. The only time he would have occasion to do it, as far as I know, is when you put him on the witness stand.

Q. But you don't ever instruct agents, or do you, to keep—

A. They can't make notes in the process of an undercover operation.

Q. But they could make notes, could they not, after the operation is over?

A. If they wanted to, they could make them.

Q. But you don't have any particular requirement that they do that?

A. It would depend on what type of case you would be working on.

Q. But there was not any such instruction that Mr. Weatherford keep any notes in this case, I take it?

A. Not that I remember.

Q. Did you ever consider that particular problem of either requiring or not requiring him to keep notes?

A. No, sir. My interest was to know when we were going to have a demonstration, and what it was about, and what building, and about how many people, and we'd go down there with cameras and so forth, and we would get our own testimony on that type cases, you know, at the time they took over the Administration Building and so forth. We would get our own information with cameras.

Q. Do you have a library or something like that here that would contain some of these instructional materials that are used at these various courses you testified your agents attend?

A. We've got one at the Criminal Justice Academy.

Q. Would that contain—

A. You're talking about the curriculum?

Q. Yes, sir. Would that contain, for example, treatises or books about reporting procedures and that kind of thing?

A. We don't have any real rule on reporting procedures for undercover agents. I don't know what you'd find up at the Academy. You'd find something on report writing.

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[From Deposition of Strom, Pages 37-44]

A. We were going to rely on the people we have here and Jack Weatherford.

Q. Now, you say that you had made an effort to stop this thing before it occurred. Tell me what you had planned

to do and what happened, why you were not able to do that.

A. I think what happened, as far as I remember, we had some kind of rainstorm, and they didn't make enough fuss for the officers to catch them. They didn't go in, as we thought they were going to do. They came to the outside and threw paint and rocks through the windows and did considerable damage. You can get an estimate of the damage down there from the draft board people.

Q. So your officers were inside the draft board?

A. I think we had some of our officers and maybe some county or city officers.

Q. They were in the draft board proper, or in the building?

A. I think on other floors or something. They couldn't hear what went on.

Q. They expected people to come inside?

A. As far as I know.

Q. And there was nobody staked out on the outside of the building, then, as far as you know?

A. There wasn't anybody staked out close enough to catch them. See, they went by there, and everything was done fast, and they took off.

Q. How many of your agents, do you recall, were staked out in the building?

A. I'd have to get that number for you and get it to you later.

Q. You could retrieve that information?

A. I believe so.

Q. How would you store that kind of information? Would there be some kind of log saying that?

A. I don't know whether they put it on the daily report, but I'll find out who they were and tell you.

Q. All right, sir; I'd appreciate it if you would. What is this daily report that you just mentioned? What is that?

A. That's mostly if you're stationed in Richland County, say, and if you were assigned in Saluda County, you could get subsistence.

Q. But if somebody were being assigned to a job in Richland County, for example, that would still appear on this daily report?

A. If he put that on his daily report. I don't know whether he did or not. We'll have to check and see.

Q. In other words, every agent is supposed to make some sort of report, note what he did during the day, whether he's here in the office or out?

A. They make some kind, if they're on expense. If these boys in Richland County are on expense, they would make a daily report of breakfast and lunch and dinner and so forth.

Q. And would they also set out in some brief detail, brief fashion or some detail, what they did during the day?

A. You don't make it on everything that you do, I mean just depending on what the occasion may be. But I'll get you the information you want, be glad to do it.

Q. Would any of these individuals actually participating in the stakeout have made a report of that?

A. If they did I don't know, but I'll check.

Q. All right, sir, I'd appreciate it if you'd do that, too.

A. Be glad to.

Q. Do you recall discussing with Mr. Weatherford that there was going to be a stakeout there? Did you tell him that you'd have people there that night?

A. It seems to me like I would have. I most likely did.

Q. Do you recall discussing that with him after the event—that is, after the raid, after it took place? You said you talked to him after that. Do you recall going into that with him? He obviously knew that they weren't apprehended, but—

A. They weren't apprehended because they went there so fast. I think it was some kind of rainstorm or something came up, and that was discussed. After I got these names and we took these statements, that was about it, really.

Q. So the date of the arrest was March 20, and Mr. Weatherford was there through August, or until September 1st, 1970. That's about five months.

A. Right.

Q. What did he do during those five months? Was he still at the University, being an undercover agent?

A. I think he was going to school, and maybe some type instructor; I'm not sure about that. Of course, when they questioned him, he was known then, but he could still, you know, know what was happening on the campus.

Q. And he was still acting as an agent during that period?

A. Yes, that's right.

Q. And he was making phone calls to you during this time?

A. He made some phone calls; I'm not sure how many after that.

Q. Did you give him any additional or different instructions after March 19th, 1970?

A. After the trial?

Q. Immediately after the incident at the draft board had occurred, on March 19th, did you give Mr. Weatherford any additional or different instructions?

A. No, not that I remember.

Q. You just told him to keep doing the same thing that he was always doing, or did you even bother to tell him that?

A. I don't think I bothered to tell him anything, just a routine matter.

Q. Was it your expectation as his employer that he was going to continue doing the same thing that he had been doing before?

A. Well, I knew of his ability to evaluate a situation, and even though his cover was blown he still was worth what we paid him.

Q. Right. But was it your expectation that he would be doing the same thing right along that he had been doing?

A. After the trial about the draft board you're talking about?

Q. I'm talking about after the arrest, now, and before the trial.

A. I don't think after the arrest anybody knew.

Q. In other words, his cover was still good until the trial?

A. I don't believe it was that good. People, as far as I know, had heard a little something, but I don't believe anybody really knew it for a fact.

Q. So you assumed that his cover was still good after the arrest?

A. I assumed that, yes, sir.

Q. And you didn't modify your instructions to Mr. Weatherford in any way following the arrest?

A. No, sir.

Q. And as his boss you perceived that he would function in the same way as he had before?

A. As far as I knew, he could, yes.

Q. So I mean you didn't try to hire any other agents to do some of the things that he had been doing?

A. No, sir.

Q. He was still your man at the University and you felt he could function that way?

A. Yes, sir.

Q. Now, I believe that there was a disturbance at the University in May of 1970. Did Mr. Weatherford, to your knowledge, have any role in that disturbance? Was he a participant? Do you know?

A. What was that?

Q. That was following the Kent State shootings and the bombing in Cambodia, and I believe that Russell House was—

A. I'd have to check that for you, too.

Q. But you don't recall that he had any particular role to play in that?

A. He was in and around, because when I'd go down there he was in and around and seemed to be pretty much in command of the things that were happening on campus.

Q. Were you satisfied that you were getting good information during this period of time?

A. I was pretty much satisfied, as far as he could do.

Q. Had he been doing as well then as he had been earlier—that is, was he performing to your satisfaction then?

A. Yes, sir.

Q. Had his performance—that is, as far as getting information to you—been at about the same level that it had been prior or at the time he was first hired?

A. As far as I know.

Q. I believe you said that at the trial of Bursey that Weatherford's cover was completely blown. Did you regard his usefulness as an undercover agent to be ended, then, in July of 1970?

A. So far as the campus and Bursey was concerned and that area, it had been completely blown, I think.

Q. I think the record will show that Bursey's trial was July 27, 1970, and you testified that the last payment to Weatherford was September 1, 1970, so am I correct in concluding that Weatherford was carried on the payroll for two months after the trial and then he was terminated?

A. I would have given him a job as an agent, and as far as I know I offered him a job as an agent and would have been glad to keep him as a regular agent and sent him to the Academy and so forth, but he wanted to go work on his master's.

Q. Now, did you discuss with Mr. Weatherford the upcoming trial of Bursey?

A. No.

Q. And will you tell me why you did not? Did you never have occasion to?

A. Well, I didn't see any need for it, because we knew what we had and had discussed it with the solicitor, and I hadn't planned whatsoever that Jack Weatherford would testify. I didn't know he was going to testify. I didn't know the solicitor was even considering putting him on the witness stand until just a few minutes before the trial started.

Q. So you had no conversations, then, with Weatherford after you got the two statements from Mr. Bolding and Mr. Finney? You had no discussions with Mr. Weatherford.

IN THE RICHLAND COUNTY COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA

versus

BRETT ALLEN BURSEY

TRANSCRIPT OF RECORD

[Transcript of Record, Court of General Sessions—pages 35-57]

Plaintiff's Exhibit (4)

TESTIMONY OFFERED ON BEHALF OF THE STATE

Mr. Jack M. Weatherford, a witness called on behalf of the State, being first duly sworn, testifies:

DIRECT EXAMINATION

By The SOLICITOR:

Q. Are you Jack M. Weatherford?

A. Yes, sir.

Q. Mr. Weatherford, I believe you are an agent of the State Law Enforcement Division, is that correct?

A. Yes, sir.

Q. How long have you been working for Mr. "Pete" Strom sitting here?

A. A little over a year.

Q. A little over a year?

A. Yes, sir.

Q. And this long hair and attire is the way you have been going for about a year, is that right?

A. Yes, sir, that's correct.

Q. I see. In addition to being a SLED agent, what else do you do?

A. I attend the University of South Carolina.

Q. The University of South Carolina?

A. Yes, sir.

Q. Do you have a degree?

A. Yes, sir, Bachelor of Arts, in Political Science.

Q. You have a Bachelor of Arts degree in Political Science?

A. Yes, sir.

Q. And what are you doing now—taking graduate work?

A. I want to get a Master in Sociology, yes.

Q. How long have you known the defendant, Brett Allen Bursey, just roughly?

A. Since September, of last year.

Q. Back on the 19th and on the 20th of March, of 1970, were you with Mr. Bursey?

A. Yes, I was.

Q. On the night of March 19th, where, if anywhere, did you go with Brett Bursey?

A. I first met Mr. Bursey up at Gantt's Restaurant, on Sumter Street, and then, later, we met again at the residence of "Pat" Mulcahey, and then, later, we went to the Selective Service Center, on Gervais Street.

Q. All right. Let's take the first place you met him, at Gantt's Grill. Now, that's located where?

A. On Sumter Street, at the corner of Sumter and Pendleton.

Q. That's right across from the University?

A. Right near the University.

Q. I see. Now, do you know whether that was in the day time or night time that you met him at Gantt's Grill?

A. It was 5:00 o'clock in the afternoon.

Q. Did you all discuss anything at that time?

A. Yes, sir. We discussed taking some kind of action toward the Draft Board.

Q. What did Bursey want to do, if anything?

A. Well, he wanted to—one of the things he suggested was that we throw a "Molotov cocktail" in it, or we could demonstrate the next day, just have a peacful demonstration, but since there were not enough people for a demonstration, he thought it best that we take some type of secretive action during the night.

Q. All right. Now, you said you met him several times. Now, did you agree to meet him later, or what arrangements did you have, when you left him on that occasion?

A. At the time we left, it had been decided to throw a "Molotov cocktail" through there, and we would meet back at Mr. Mulcahey's residence at 12:00 o'clock in the night.

Q. Whose residence was that?

A. Mr. "Pat" Mulcahey's.

Q. What type of business is this "Pat" in?

A. He is a gun dealer.

Q. A gun dealer?

A. Yes, sir.

Q. And where is his residence located?

A. Near the Veterans' Hospital, but now I can't recall the street.

Q. Did you go out there that night?

A. Yes, sir, I went out and met him at 12:00 o'clock as we had arranged to do.

Q. When you went out, how did you get there?

A. I drove my car.

Q. Your car?

A. Yes, sir.

Q. Who owns that car?

A. I do.

Q. You owned the car?

A. Yes, sir.

Q. I see. That's your personal car?

A. Yes, sir.

Q. Did anybody go with you out there?

A. No. I was supposed to meet him out there.

Q. You met there?

A. Yes, sir.

Q. When you got there, who was there?

A. Well, Mr. Mulcahey was there, and Mr. Bursey was there, and Mr. Blocker—Bolder, I believe it is, Dan Bolder.

The SOLICITOR: Will you stand up, please? (Addressing person in audience.) Is this Mr. Bolder?

The WITNESS: Yes, sir.

Q. Was anybody else there?

A. Mr. Finney.

The SOLICITOR: Will you stand up? (Addressing person in audience.) Is this Mr. Finney?

The WITNESS: Yes, sir, that's Mr. Finney.

The SOLICITOR: All right, you gentlemen sit back down.

Q. Was Bursey there when you got there?

A. Yes, sir, he was already there.

Q. All right. Now, just tell us what Bursey said or what transpired, in your own words, out at this fellow's house, the gunman's house.

A. Well, Mr. Bursey called me aside and wanted to talk to me without the others hearing and, since Mr. Finney was there, and he was someone who had been involved in it before, he didn't want him to hear it, and he wanted to go over the plans. So we stepped out on the front porch to get away from everyone else and started talking about it with Mr. Mulcahey. Mr. Mulcahey said that he thought it was too dangerous; that we hadn't planned it through well enough.

Q. Too dangerous to do what?

A. To throw the "Molotov cocktail" through the Selective Service window.

Q. These ladies and gentlemen might not know. Tell us what a "Molotov cocktail" is.

A. Well, it's a homemade bomb made with a "Coke" bottle, or some other bottle, with gasoline in it and a rag coming out of the top.

Q. All right, sir. And he said it was too dangerous?

A. He thought that we hadn't planned planned it out adequately enough, and that we didn't know the people that we were working with well enough.

Q. Go ahead now and tell us what was said, in your own words, and just carry it right on through.

A. Well, Mr. Mulcahey suggested that we should do something less drastic, and so Brett decided that it would be best to do something like just doing a "dry run", where we would throw a bottle with paint in it instead of gasoline, and then he hit on the idea also of leaving a note to let people know that it could have been more drastic than it was. So he decided to draft up a note and attach it to a brick and throw it through as well.

Q. Was there a note prepared or not?

A. Yes, sir, there was.

Q. How did he do that? Tell the jury how he prepared the note and so forth.

A. Mr. Bursey drafted the note—

Mr. WISE: Excuse me, your Honor. I didn't catch who the Solicitor was referring to when he said "he"—he said "he prepared the note".

The COURT: Solicitor, be more specific, and the witness will be more specific in designating who is who.

Mr. WISE: Thank you, your Honor.

The SOLICITOR: What did Brett Bursey have to do with the note?

The WITNESS: He drafted the note. He wrote the first copy of it.

Q. He wrote a copy of it?

A. Well, he wrote the note. After he planned the note, what he was going to say and so forth, he wrote it out, and then he asked Mr. Finney to copy it.

Q. He asked who now?

A. Mr. Finney.

The SOLICITOR: Will you stand up again? (Addressing person in audience.) That's this gentleman here with the long hair?

The WITNESS: Yes, sir.

Q. He asked him to do what?

A. To copy it over. Mr. Bursey didn't want it in his handwriting.

Q. All right. Did this fellow here copy it for Bursey?

A. Yes, sir, he did.

Q. All right. What happened next?

A. After the note was copied, it was attached to a brick, and they took a quart size Coca Cola bottle—

Q. Now, who are "they"?

A. I think, Mr. Mulcahey found the bottle. It was just a bottle laying around the house somewhere, or else, I think, Mr. Bursey brought the bottle with him. They took the bottle, and Mr. Mulcahey had some red paint there, and they poured it into the bottle and prepared everything. And Mr. Mulcahey had some surgical gloves and he said we should use those to make sure we didn't leave fingerprints. So we took those, and it was pouring rain that night, and so we all got some coats to make sure we didn't get wet, and everyone had on—well, it was winter time, and we put on a lot of protective clothing, and generally prepared for going out for this type of thing.

Q. All right. Did you ever get to any place in town?

A. Yes. We left there and drove up to Senate Street.

Q. In whose car were you in?

A. In Mr. Bolder's.

Q. Whose?

A. In Mr. Bolder's.

Q. This gentleman here (indicating)?

A. Yes, sir.

Q. And who was driving?

A. Mr. Bolder.

Q. And who else was in the car?

A. I was in the car, and Mr. Bursey was in the car, and Mr. Greg Merrick was in the car.

Q. All right. Who decided where you were going?

A. Well, they had had two alternatives that afternoon when we left. Mr. Bursey said we would either go to the Draft Board on Senate Street—I mean on Gervais Street, or to the State Headquarters, which was up near Assembly Street, but Mr. Bursey decided that night that we should go to the one on Gervais Street, and so we went there.

Q. Now, this building on Gervais Street, briefly describe that building to the jury, for example, the first floor, and just describe briefly the building to the jury.

A. Well, it's approximately a four or five-story structure, but the first floor is used for parking. It has columns around the edge so that cars can drive in, and it's all open except for one central part with an elevator, so that you can go up to the other floors. So the first floor is mostly just open space for parking.

Q. All right. Tell the jury, in your own words, where you parked, where you got out, if anybody did, and what happened.

A. Well, we parked on Senate Street, and Mr. Bursey, and Mr. Merrick and myself got out, and Mr. Bolder stayed inside the car. We "snuck" around through some back yards of some houses, and came up to the back of the Romber Building, and dashed across the open and up under the building, so that we were in the parking lot that was under the building. And Mr. Merrick went up to the front of the building to look and see if there were any cars coming, or if there were any policemen nearby or anything like that, and Mr. Bursey already had two cans of paint, and he took a can of paint and started painting, and he told me to go ahead and finish up.

Q. Painting on the building?

A. Yes, sir, painting on the side of the building, "Hell, no, we won't go".

Q. All right, just one minute. I hand you two pictures. (Hands photographs to witness.) Do you recognize either one of those pictures?

A. Yes, sir, I recognize both of them.

Q. You recognize both of them?

A. Yes, sir.

Q. Well, let's take one of them—for example, this one—who did that?

A. I believe this is the one in the back, and I wrote the word "Now" and Mr. Bursey wrote the word "Peace" and the symbol.

The SOLICITOR: We offer this one in evidence.

Mr. WISE: No objection.

(4 x 5" Black and White Photograph Referred to Received in Evidence and Marked State's Exhibit No. 1. G. W. C. Jr.)

The SOLICITOR: Now, this picture is marked State's Exhibit No. 1. You wrote what part and what part did you say Mr. Bursey wrote?

A. I was the one who wrote "Now", and Mr. Bursey wrote the word "Peace" and drew the peace symbol.

Q. The two symbols there?

A. Yes, sir.

Q. Now, this other picture—you said you recognized that picture?

A. Yes, sir.

Q. Who wrote that?

A. Mr. Bursey did.

Q. What type of material did he use to write it?

A. It was a can of spray paint.

Q. Spray paint?

A. Yes, sir.

The SOLICITOR: We offer this one in evidence.

Mr. WISE: (After examining same) No objection, your Honor.

(4 x 5" Black and White Photograph Referred to Received in Evidence and Marked State's Exhibit No. 2. G. W. C. Jr.)

The SOLICITOR: Now, this is State's Exhibit No. 2. Is this the one where you say Bursey wrote that on the wall?

The WITNESS: Yes, sir.

Q. That's the same building we are talking about?

A. Yes, sir, that's correct.

Q. And I believe that shows how you drive under the building?

A. Yes, sir.

Q. Now, besides these writings that you have talked about and that you did part and Bursey did part, what else, if anything, did Bursey do that night in reference to that building?

A. As I said, we brought bricks, one with the note tied around it, and then approximately three others, I think, all of which were used, but he asked the other boy, Mr. Merrick, if he could throw the brick in, to make sure the brick with the note got in. And so, after checking out front again, to make sure there were no policemen in the vicinity

and no cars coming, etcetera, Mr. Merrick threw in the brick and a bottle of paint, and I was supposed to throw a brick, which I lobbed against the wall instead of through the window. I just tossed it against the wall, and Mr. Bursey picked up the brick and he threw it up—I don't know if it went through the window or not, but he threw it up at the window, in the direction of the window, and we took off running through the back yards again back toward the car.

Q. Now, the brick with the note, was that the same note that Bursey had this young man here (indicating) to copy out at this place?

A. Yes, sir, that's correct.

Q. It was the same note?

A. Yes, sir.

Q. What window, or what part of the building, were the bricks thrown into and the paint?

Mr. WISE: We object, your Honor. It has been testified by this witness that Mr. Bursey didn't throw the brick through the window.

The COURT: I will have to overrule that objection.

The SOLICITOR: What window were the bricks and the paint and whatever it was thrown into?

The WITNESS: Well, Mr. Bursey, already knew which windows belonged to the Selective Service, and so he selected the window, and it's on the first floor that has offices.

Q. Bursey selected it? You mean he showed you all which window?

A. That's right. He chose the window that was something like the third or fourth from the end. I don't remember exactly which window it was now.

Q. Did he say how he knew that was a Selective Service window?

A. Well, he said that he had been in there prior to that.

Q. That he had been in there prior to that?

A. Yes, sir.

Q. Then what happened. After you say you threw a brick, and Bursey picked it up, and you don't know where it went then, what happened after that?

A. We ran through the back yards back to the car, and got in the car and left.

Q. And you left?

A. Yes, sir.

Q. Do you know where this paint came from?

A. I believe, Mr. Bursey said he had gotten it from the K-Mart, but I am not positive.

Q. He had it the first time you saw it? Who furnished the paint?

A. He brought it that night that we met at 12:00 o'clock.

Q. He brought it with him?

A. Yes, sir.

Q. Will you point out to the jury the defendant, Brett Bursey?

A. He is the gentleman sitting in the middle at this table here (indicating) with the dark brown suit on.

Q. All right. Whose idea was it to go down and throw the bricks and the paint that night?

A. Mr. Bursey's.

Q. Mr. Bursey's?

A. Yes, sir.

Q. All right. Answer any questions—By the way—one minute—well, that's all right. Answer any questions these gentlemen may have to ask you.

CROSS EXAMINATION

By Mr. WISE:

Q. Mr. Weatherford, you have known Mr. Bursey how long?

A. Since September, of last year.

Q. You have cultivated a good friendship with him?

A. Yes, sir.

Q. You have cultivated a friendship with a lot of people at the University, haven't you?

A. Yes, sir.

Q. And you know a good many members of Mr. Bursey's group and so forth?

A. Yes, sir, I suppose so.

Q. In fact, you have actually participated with this group on numerous occasions?

A. Yes, sir.

Q. Are you the head of any student organizations at the University?

A. I happen to be co-Chairman with Mr. Bursey and Mr. Herbert—

Q. Are you the head of any organization now?

A. No.

The SOLICITOR: Your Honor, let him finish.

The WITNESS: No, I'm not.

Mr. WISE: You were co-Chairman of what?

The WITNESS: Of "AWARE".

Q. That's what organization on the University campus?

A. It's—you mean as far as its affiliation?

Q. Yes.

A. Well, at the beginning of this year, "AWARE" was affiliated with SDS, and we dropped the affiliation with them when SDS started splitting up, and then we affiliated with the Revolutionary Youth Movement, and I think they dropped the affiliation with the Revolutionary Youth Movement.

Q. You have a lot of friends in this movement, so to speak, do you not?

A. Yes, sir.

Q. And you have come to Court to testify against this man?

A. Yes, sir.

Q. And this is the way you treat all your friends, is it not?

The SOLICITOR: Your Honor, I believe that's argument: how he treats his friends.

The COURT: The objection is overruled.

The WITNESS: I made my affiliation with these people because I was a SLED agent. I knew none of them prior to being a SLED agent. I was hired as a SLED agent, and I went out to the UFO, and there I met Mr. Bursey, and I met others in this group, and during this past year I have spent a lot of time with them.

Q. Well, that still doesn't change the fact that they were your friends and they thought you were their friend?

A. Many of them are my friends, I feel.

Q. They still are?

A. Yes.

Q. And you have come to Court to testify against them?

A. The individuals that I feel are wrong, I feel like I can come here to Court and say what I believe happened, and what I saw happen, and what I heard happen against the law.

Q. Well, Mr. Weatherford, when this idea was planned, did you say, "Wait a minute, we can't do this. It's against the law"?

A. I did not.

Q. You did not?

A. No.

Q. You willingly participated in this illegal act that you are now criticizing?

A. As small amount as possible. I always tried to not violate the law. For example, when we went to throw the bricks, I made sure that I did not throw the brick where it would do any damage. I lobbed it against the side of the wall.

Q. You painted the side of the building, did you not?

A. One word.

Q. Is that not breaking the law?

A. It is.

Q. All right, Mr. Weatherford, did you have a conversation with me yesterday?

A. I did.

Q. Did I ask you if you were going to be here today?

A. You did.

Q. And what did you respond?

A. Well, you asked me if the people from SLED had asked me to come up here today, and I said, "No", that they hadn't.

Q. Had I talked to you previously about this trial?

A. You did.

Q. Had I asked you previously if you were going to be here?

A. You had.

Q. And what did you respond on those occasions?

A Not that I knew of.

Q. That you were not going to be here?

A. Right.

Q. Now, Mr. Weatherford, when they planned or spoke of this action against the Draft Board originally, what was Brett's idea concerning guerilla theatre type action?

The COURT: What was that?

Mr. WISE: Concerning the guerilla, the so-called guerrilla theatre, what was his idea?

The WITNESS: On the date prior to our meeting, it was suggested that we have a demonstration the following morning, on the morning of the 20th, I believe.

Q. Composed of what?

A. It was never set. It was just Mr. Bursey's idea to have a demonstration.

Q. Well, was it ever suggested that the people approach the Draft Board with some sort of guerilla outfit and tack a note on the door condemning it as a health hazard?

A. That was suggested.

Q. Was that Mr. Bursey's idea?

A. I believe it was, but I'm not positive.

Q. And there is nothing illegal about this idea?

A. Not that I know of.

Q. Now, when you all met at Gantt's to plan this, were any actions taken toward procuring "Molotov cocktails"?

A. Well, at the time we were just sitting in Gantt's and it was just being planned, and Mr. Bursey was to be the one responsible for getting the equipment together. So he did come that night with the bottles. We had two "Coke" bottles, quart size "Coke" bottles, to make the "cocktails".

Q. He didn't come—

The SOLICITOR: Your Honor, he keeps interrupting him before he finishes.

Mr. WISE: Excuse me. Go ahead.

The WITNESS: He was going to make the arrangements as far as getting the necessary equipment, and he did bring some of it.

Q. Did he not bring any gasoline with him?

A. Well, I believe he said we could get gasoline out there, just take it out of the car.

Q. But he didn't bring any with him?

A. Not that I know of.

Q. And that's an integral part of a "Molotov cocktail", is it not?

A. He had a tank full of gas in his car, and in that sense he brought it, but as far as having it already in the bottle ready to throw, I didn't see any.

Q. What about rags and so forth? Are they an integral part of a "Molotov cocktail"?

A. They are.

Q. Did he bring any of those?

A. Not that I recall.

Q. In other words, he did nothing more than bring two bottles, which you assumed were for "Molotov cocktail" purposes?

A. Which was the stated purpose.

Q. But he never brought any other equipment?

A. Not that I know of.

Q. Now, the only act then that Mr. Bursey did, according to your testimony, at the Draft Board was simply painting a sign on the side of the building. He did not throw a brick through the window?

A. He threw a brick at the window, but—

Q. He did not throw one through the window—

The COURT: Let the witness finish his answer. When you ask him a question, you have to give him an opportunity to answer it.

Mr. WISE: I didn't think it was responsive, but I apologize.

The WITNESS: I said that I wasn't standing there to see whether or not it went through, because I started running, and all I can say is he threw it at the window. Whether or not it went through, I don't know. The window had already

been broken, so I assumed that it had gone through. If it hadn't gone through, it wouldn't have been inside.

Q. Who did throw the brick through the window?

A. Mr. Merrick threw a brick and Mr. Bursey threw a brick.

Q. He threw one at the window, but you didn't see it go through?

A. I didn't see either brick go through the window.

Q. Well, did you see Mr. Merrick throw the paint through the window?

A. I saw him throw the paint at the window.

Q. So Mr. Merrick threw the paint and stuff, and Mr. Bursey merely painted the side of the building along with you?

A. And threw a brick.

Q. Excuse me just a minute. Did you not also testify that Mr. Bursey brought the paint with him?

A. That's correct.

Q. He brought the bottles and paint?

A. Spray cans.

Q. And not bottles and paint?

A. Pardon?

Q. He brought bottles and paint to Mr. Mulcahey's house?

A. He brought Coca Cola bottles and he brought spray paint.

Q. Do you know where Mr. Merrick is?

A. No, I do not.

Mr. Wise: I have no further questions, your Honor.

RE-DIRECT EXAMINATION

By The SOLICITOR:

Q. When did I first tell you that you were going to testify and your identity be revealed?

A. About thirty minutes before I came into the Court Room.

Q. This morning?

A. Yes, sir.

Q. That was the first time you knew that you were going to have to reveal your identity?

A. Yes, sir, that's correct.

Q. Counsel asked you about belonging to these subversive groups like "AWARE" and all. Who told you to get into those groups?

A. I went into those groups under instructions of Mr. Strom.

Q. Mr. Strom?

A. Yes, sir.

Q. And in your instructions, were you just to follow what the other people told you to do?

A. Primarily, and report back to Mr. Strom what was going on.

Q. And you have been giving Mr. Strom reports now for how long did you say?

A. Approximately a year.

Q. For a year?

A. Yes, sir.

Q. Thank you, sir.

RE-CROSS EXAMINATION

By Mr. WISE:

Q. Mr. Weatherford, did you have any idea that you would be called in this case?

Civil Action No. 73-665

DEPOSITION OF JACK McIVER WEATHERFORD

Los Angeles, California

March 21, 1974

[From Deposition of Weatherford, Pages 87-92]

Plaintiff's Exhibit 5

• • •

the day after that, but sometime within, say, two or three days after the incident.

Q. Who was arrested?

A. Mr. Bursey was arrested and I was arrested.

Q. Was anyone else arrested?

A. Other people were taken in. I don't know if people were arrested—I really don't know. At the time that Mr. Bursey was taken in, I was with him and we both were taken in. We were the only two at that time.

Q. What were you charged with?

A. I don't know. I don't know if I ever even saw the charge. I—

Q. Were you surprised that you were arrested and charged with a crime?

A. I wasn't surprised I was taken in. I knew exactly when I was going to be taken in, but—

Q. How did you know when you were going to be taken in?

A. Because it was by prior arrangement.

Q. How did that arrangement get made?

A. Well, Mr. Bursey had a number of weapons at his home, and it was deemed better for everyone's safety not to try to go to his home to arrest him, and I knew a particular time that he was going to be on campus, and I knew the particular time when I thought he would be either unarmed or at a fair distance from any arms, and it would be a much easier process to arrest him there, because he had said that if anyone tried to arrest him, he would shoot, that he wasn't going to be arrested, he wasn't going to be taken in, because he would never get out again, and I felt he was serious on that and so precautions had been taken.

Q. Did Mr. Bursey have any kind of prior record?

A. I believe he did, but I'm not sure.

Q. Do you recall if he had any prior felony convictions?

A. I'm not sure of that.

Q. Had he served any time in state prison?

A. I don't know.

Q. When did you make these arrangements for the arrest of yourself and Mr. Bursey?

A. Probably the next morning afterwards or the next day.

Q. Do you have a recollection of that?

A. Do I have a recollection of actually who I talked with?

Q. Of talking with someone at SLED or some law enforcement agency and making the arrangements for the specific time and the specific place where you felt it would be safe to arrest Mr. Bursey?

A. It could have been with Lieutenant Gasque or it could have been with Mr. Cook, because I think both of them were involved in the arrest, as was Mr. Clark, Mr. Freeman, Mr. Gantt. I think all those people were involved.

Q. Now, where was the arrest?

A. In the Russell House.

Q. And what time of the day?

A. I think afterenoon.

Q. And what day was this?

A. It was either the day following the incident or else the day after that. Within two days of the incident, I think.

Q. Had you made the determination where and when the arrest should take place?

A. I had told them when and where I thought would be the best time, and the other people involved agreed that would be the best time, the best place.

Q. Did you suggest that it was necessary that you be arrested and be a defendant in this case?

A. I don't recall if I did or not.

Q. Did someone indicate to that it would be best to maintain your cover if you were arrested and became a defendant in this case?

A. I have no idea. I just don't remember.

Q. This is a fairly important event in your life. You have no prior misdemeanor or felony arrests?

A. I certainly didn't think of myself as being charged with a crime.

Q. Did you have any prior arrests?

A. No. I have been taken in many times, as I told you, in this same sort of—

Q. That is, when you were an informant and when you were taken in as part of a dragnet?

A. Exactly.

Q. So, charges were always dropped?

A. I don't think charges were ever made.

Q. So, you don't have any convictions at all on your record up to this time?

A. No, sir, that's correct.

Q. You didn't regard that, in fact, you would ever be brought to trial?

A. No, sir, I did not.

Q. What did you think would happen?

A. I assumed that Mr. Bursey would be tried.

Q. What did you think would happen to you?

A. Nothing. I would continue doing exactly what I was doing.

Q. Who told you that this would be the procedure?

A. I don't know as anyone informed me that that would be the procedure or if I just assumed it would be.

Q. You had no conversations at all with Mr. Strom about how you would behave in the situation?

A. There has never been any question of my being taken to court raised. I didn't—

Q. What was your conversation with Mr. Foard, the prosecutor?

A. In reference to this case?

Q. You spoke with him several days after the incident, on the day you were arrested?

A. I don't recall that.

Q. Do you recall when the first time was that you spoke with Mr. Foard, the prosecutor?

A. On the morning of the trial, I saw him.

Q. You spoke with him at no other time prior to that?

A. I well could have even seen him on the street or anywhere else. Mr. Foard was a well-known person in the town. I had no meeting with him, or anything like that.

Q. Did you have a meeting with anyone on his staff?

A. No, sir.

Q. Who is Mr. Frank Taylor?

A. He was my lawyer at the time.

Q. Why did you retain a lawyer?

A. Because if I didn't have my own lawyer, the ACLU would be very anxious to extend its involvement in the case to try to cover me, and I didn't want to get involved in that, and so I simply said that Mr. Taylor was my lawyer.

Q. Did you ever hire Mr. Taylor?

A. No, sir, I did not.

Q. Did you ever pay Mr. Taylor any money?

A. No, sir, I did not.

Q. Why did you get Mr. Taylor's name?

A. Because Chief Strom suggested that he would be the person to do it.

Q. Did you ever visit with Mr. Taylor?

A. Yes, sir, I did.

Q. When did you talk with him?

A. I talked with him briefly one Saturday morning.

Q. When was that Saturday morning?

A. Any time between, say, a month after the incident, I'm not sure.

Q. What did you talk with him about that Saturday morning?

A. He just wanted to know what I looked like so that he would know who he was supposed to be representing, and that was the primary function of the meeting.

Q. What did you say?

A. We just talked casually, and that was—

Q. Did you talk about the details of the incident?

A. No, sir.

Q. Did you talk about what would happen at trial?

A. There was no trial discussed.

Q. What did you think was going to happen?

A. Nothing.

Q. Why did you think you had to have a lawyer?

A. I had to have the name of a lawyer so that if the ACLU wanted to contact somebody as my lawyer, that they would have a lawyer to contact instead of them trying to take and represent my case.

Q. Do you recall the name of an assistant to Mr. Taylor that you spoke with?

A. I didn't speak with any assistant to Mr. Taylor. There was no one else in the office. That was why it was on Saturday morning. It was scheduled for a time when only Mr. Taylor would be there.

Q. Are you familiar with a man named Jimmy Spruil? I may not be pronouncing it correctly, but—

A. No, I am not.

Q. Did you ever talk to him on any occasion?

A. Not to my knowledge. I don't even know the name at all.

Q. I may not be pronouncing it correctly, so perhaps you can't recollect. Does the spelling S-p-r-u-i-l mean

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

Civil Action No. 73-665

BRETT ALAN BURSEY, PLAINTIFF,

versus

JACK M. WEATHERFORD *et al.*, DEFENDANTS.

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

This case was tried before the Court without a jury in Columbia, South Carolina on June 10 and 11, 1974. It is brought under 42 U.S.C. 1983 seeking monetary damages to redress the alleged deprivation, under color of state law, custom or usage of the plaintiff's rights, privileges and immunities secured by the Constitutions of the United States and the State of South Carolina.

The plaintiff contends that his right to a fair trial before the Court of General Sessions for Richland County, South Carolina on July 27, 1970 was prejudiced and his constitutional rights violated by the actions of the defendants. On July 27, 1970 the plaintiff was tried and convicted by a jury of the crime of malicious destruction of property occupied by the Richland County Selective Service Board, and alleges that prior to the trial the defendants Strom

and/or unknown agents and officials did instruct the defendant Weatherford, in the latter's official capacity as an undercover agent for the State Law Enforcement Division (SLED), to continue to pose as a criminal defendant under indictment for charges arising out of the same incident from which plaintiff's conviction arose and that the defendants instructed Weatherford to seek by the employment of false pretenses admission to the attorney-client communications between the plaintiff and his retained counsel, and following said instructions the defendant Weatherford became privy to such communications and trial strategy to be employed in the plaintiff's defense and that said Weatherford reported back to defendant Strom and/or his agents and to the prosecuting attorney for the State information pertaining to the plaintiff's defense.

The plaintiff contends that such alleged actions constitute an illegal search and seizure, in violation of his rights under the Fourth and Fourteenth Amendments, a violation of his right to effective counsel under the Sixth and Fourteenth Amendments and a violation of his right to a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and under similar Articles and Sections of the Constitution of the State of South Carolina. The plaintiff prays for actual and punitive damages, court costs and attorneys fees.

The defendants deny that any of them sought information from the plaintiff or his attorney regarding his strategy or plans in defending himself against the criminal charge and further deny that if any information was obtained by defendant Weatherford it was by accident and not be design and such was not communicated to the defendant Strom or to the prosecuting attorney handling the criminal action brought against the plaintiff.

After hearing the testimony, reviewing the exhibits, reading the depositions introduced and studying the applicable law, the Court makes the following

Findings of Fact

1. The plaintiff is a male citizen of the United States and a resident of Richland County, South Carolina.

2. The defendant Jack M. Weatherford is a male over the age of 21 years, a citizen of the United States and now a resident of LaJolla, California, but at the times hereinafter mentioned was a resident of Richland County, South Carolina and employed by the South Carolina State Law Enforcement Division as an undercover agent investigating primarily drug and anti-war activities throughout the State of South Carolina.

3. That the defendant Pete Strom is a male citizen of the United States, over the age of 21 years, and a resident of Richland County, South Carolina. At all times material to this action defendant Strom was Chief of SLED and one of his official duties was to supervise its agents and officers, including undercover agents such as defendant Weatherford, in the performance of their duties.

4. That some months prior to March 1970 defendant Weatherford was employed by SLED as an undercover agent. At that time he was attending the University of South Carolina and became acquainted with the plaintiff through an organization known as "AWARE", which was a group on the University Campus formed to discuss the need for social change and opposition to the war in Viet Nam.

On the night of March 19, 1970, as a part of demonstrations connected with "National Anti-Draft Week" the plaintiff, the defendant Weatherford and one of two others went to the office of the Richland County Selective Service in Columbia, South Carolina, where a brick was thrown through a window, red paint was sprayed and splattered on the inside and outside of the building. Attached to the brick was a note attacking the Selective Service System and the war in Viet Nam.

5. On the morning of March 20, 1970, the plaintiff and defendant Weatherford were arrested after Weatherford had advised SLED agents of the participation by the plaintiff and Weatherford in the activities at the Selective Board Headquarters. Following the arrest the plaintiff and the

defendant were taken to the Richland County Jail, where they were booked, charged with the offense and placed in separate cells. At the time of their arrest they were handcuffed together and plaintiff suggested that they keep silent and seek legal counsel.

6. The plaintiff was in jail approximately 12 days because of difficulties in arranging bond. Defendant Weatherford was released after a day, his bond having been posted for him by a Dr. Hardwicke.

7. Following plaintiff's release from jail he met with defendant Weatherford and asked him how he got out of jail, who posted his bond and whether he was represented by an attorney. Plaintiff was advised by said defendant that his bond had been posted by Dr. Hardwicke and arrangements had been made by Hardwicke for him to be represented by Attorney Frank Taylor, Sr., a well known member of the Richland County Bar.

8. That shortly after this meeting the plaintiff employed C. Rauch Wise of Greenwood to represent him in connection with the criminal charges. Following his release from prison defendant Weatherford continued to act as an undercover agent in the employment of SLED and was engaged in investigating activities and seeking information regarding law violations not only in Columbia but in other South Carolina cities. During this time he remained on the payroll of SLED and made most of his reports to Lt. Ronald Cooper, and rarely had any contacts or dealings directly with defendant Strom.

9. On two occasions following the employment of plaintiff's attorney said attorney, the plaintiff and the defendant Weatherford met and the approaching trial was discussed. On neither of these occasions did the defendant Weatherford seek information from the plaintiff or his attorney, and on neither occasion did he initiate or ask for the meeting. He was brought into the meetings by the plaintiff and plaintiff's attorney in an effort to obtain information, ideas or suggestions as to the plaintiff's defense. From the beginning Weatherford advised plaintiff and plaintiff's attorney that Weatherford would obtain a severance of his case from that of the plaintiff. This severance was to be upon the ground that Weatherford might be prejudiced in going to trial with Bursey as a codefendant, because of Bursey's reputation and participation in other activities which had been covered by the news media. On no occasion did Bursey or his attorney question the granting of a severance, nor did they seem to concern themselves with whether the prosecutor would consent to a severance, although such consent is quite unusual where codefendants are charged with the same crime and proof will be from the same witnesses based upon identical facts. At those meetings between plaintiff, plaintiff's attorney and defendant Weatherford the plaintiff and his attorney raised the question of a possible informer being used to prove the case, but they never asked Weatherford if he were an informer and he never specifically denied being an informer, since he was never asked or accused.

10. The defendant Weatherford did not reveal himself as an informer at the two meetings with the plaintiff and the plaintiff's attorney. He also met the plaintiff's attorney on several occasions at the social events, usually connected with the Chapter of the American Civil Liberties Union in Columbia, South Carolina. On these social contacts he was not asked if he was an agent. In most meetings with the plaintiff's attorney the defendant Weatherford was questioned about how his attorney, Frank Taylor, Sr., was handling his defense. This was a natural reaction of a younger attorney trying to learn from an older more experienced attorney.

11. That following the various meetings with the plaintiff and/or plaintiff's attorney nor at any other time did the defendant Weatherford discuss with or pass on to defendant Strom, any agents of SLED, or to Solicitor John Foard and/or any of his staff any details or information regarding the plaintiff's trial plans, strategy, or anything having to do with the criminal action pending against plaintiff. Until the morning of the 27th of July, 1970, Weatherford did not know he would be used as a witness in the criminal action and Solicitor Foard had not decided, until just prior to the call of the case, that he would use Weatherford as a witness. Up until that time he intended

to use as the primary witness for identification of Bursey and his participation in the crime one William Burt Finney, III, a student at Clemson University, who knew Bursey, had met him on the night of March 19, 1970 and had written out for Bursey the note which was attached to the brick found inside the Selective Service Office.

12. The attorneys Wise and Taylor met on one occasion prior to the trial of Bursey, but nothing was said which could have misled plaintiff's attorney in handling his defense and no information was passed to Attorney Taylor by Wise regarding defense plans and strategy. Mr. Taylor did not discuss with any representative of SLED or the prosecutor or any representaitve of the prosectuor the meetings with plaintiff's counsel or any information obtained from said meetings.

13. Up until the date of the trial the prosecutor and SLED preferred to try the case without the testimony of Weatherford rather than run the risk of revealing him as an undercover agent, due to other matters Weatherford was investigating in and around the University of South Carolina and at other points in the state. However, on the date of the trial the prosecutor and representatives of SLED decided that Weatherford had lost some of his effectiveness as an undercover agent in recent weeks due to being seen in the company of police officers on several occasions.

14. At the trial of the case of the *State of South Carolina v. Brett Allen Bursey,* defendant Weatherford was the first witness called by the State and testified as to his activities as an undercover agent and the events of the night of March 19, 1970. Other witnesses, including William Burt Finney, III also testified for the State. As a result of Weatherford's testimony Bursey took the stand in his own defense and attempted to justify his action and show that the same was not maliciously done.

15. Following conviction the plaintiff was again jailed, this time for six days, until he was released on bond pending appeal. Following his release, plaintiff discussed the appeal with his attorney, who would require an additional fee to perfect and argue the appeal, but questioned the possibility of success. Thereafter the plaintiff fled the State of South Carolina. He was a fugitive until he was picked up in Nebraska and returned to South Carolina in October 1972 and served approximately eighteen (18) months on the sentence resulting from his conviction in the trial of July 27, 1970.

16. The defendant Weatherford did not in any way interfere with the plaintiff's right to assistance of counsel or right to a fair trial nor did he obtain any information from plaintiff or his attorney amounting to an illegal search and seizure. No information following the arrest of plaintiff or following his employment of counsel was relayed by Weatherford to any agent of SLED or person connected with the prosecution of the case.

CONCLUSIONS OF LAW

A. This Court has jurisdiction of this matter under 42 U. S. C. 1983 and 28 U. S. C. 1343.

B The right of a criminal defendant to have the assistance of counsel in the trial of a criminal case is protected by the Sixth Amendment to the Constitution of the United States and has been expanded by cases from *Gideon v. Wainwright,* 372 U. S. 335 (1963) through *Argersinger v. Hamlin,* 407 U. S. 25 (1972). The right of privacy surround the attorney-client relationship is also protected by decisions, rules of court and canons of professional responsibility.

C. The plaintiff leans heavily upon the decisions in *Coplon v. United States,* 191 F. (2d) 749 (D. C. Cir. 1951) and *Caldwell v. United States* 205 F. (2d) 879 (D. C. Cir. 1953). The Supreme Court in *Hoffa v. United States* 385 U. S. 293 (1966) supported the reasoning behind the *Coplon* and *Caldwell* decisions regarding Sixth Amendment violations where agents of the prosecution reported conversations and activities of a defendant and defense counsel to the prosecution. However, the present case is a far cry from *Coplon* and *Caldwell.* In *Coplon* the FBI intercepted telephone conversations between the defendant and defense counsel through electronic surveillance, without the knowledge of the defendant or her attorney. This sur-

veillance occurred before the trial and during the process of the trial and the Court found it to be a violation of the due process clause of the Fifth Amendment and of the right of the effective assistance of counsel protected by the Sixth Amendment. In *Caldwell* the interference with counsel was occasioned by the work of an agent paid by the prosecution. He worked his way into the confidence of the defendant and defense counsel and was actually hired by them to do certain investigative work in preparing the defense of the case. He reported to the prosecution on many matters connected with the impending trial and was privy to any conference he wished to attend involving the defense counsel, defendant or witnesses for the defendant. In the present case there is no proof that Weatherford reported anything to the prosecutor or defendant Strom from the two meetings he had with the plaintiff and plaintiff's attorney Wise. The testimony on this point is unequivocal that the prosecutor and defendant Strom or any agent of either did not receive from Weatherford any information from the conferences or any information as to the defense plans. The record is clear that Solicitor John Foard did not discuss the case with Weatherford until the morning of the Bursey trial and even then received no information as to the conferences attended by Weatherford with Bursey and his attorney.

D. It is also important in the present case that Weatherford did not seek out Bursey or his attorney in an effort to obtain information from them. He did not ask to attend the conferences, did not volunteer information to the plaintiff or his attorney and it appears from the testimony that plaintiff and his attorney were more interested in finding out from these conferences what Weatherford's attorney was planning by way of defense, since Weatherford was represented by a well-known, able and experienced attorney. Nothing was done by Weatherford, the defendant Strom, any of the SLED agents, the prosecutor or Weatherford's attorney to attempt to obtain information about Bursey, his attorney or his defense plan. The prosecutor felt he had sufficient witnesses to prove the

case against Bursey and was not concerned about his defense strategy.

E. The plaintiff and his attorney both testified that they felt there must be an informer in the picture and spent a great deal of time trying to decide who the informer might be. Certainly, they should have become suspicious when the State proceeded against Bursey and not against Weatherford, and no motion for severance was made. Weatherford had originally advised Bursey and later his attorney that Weatherford would obtain a severance, which he did, but no motion was made for severance and no resistance appeared from the prosecutor. Also, Weatherford's attorney showed little or no interest in the case in his brief discussion with plaintiff's attorney. The severance was not mentioned in this conversation and Weatherford's attorney never asked permission to discuss the case with Bursey or showed any interest in the facts. These activities did not mislead the plaintiff and his attorney. Such facts should have put them on notice that Weatherford might be an agent.

F. The plaintiff contends in effect that the law requires an undercover agent to reveal himself and stop his activities once an arrest has been made. This is not supported by the decisions. There is no requirement that an undercover agent reveal himself to the person arrested at the time of such arrest or at any time prior to the trial. The *Coplon* and *Caldwell* decisions prevent such an agent from taking advantage of his position as a confident of the defendant in order to obtain privileged information from a defendant or his attorney to be used in his prosecution. In the present case separate counsel was obtained for Weatherford so that he could keep his cover and could avoid having to explain why he did not wish to be represented by Bursey's attorney. This action was designed to protect Weatherford, and to insure Bursey's constitutional right to due process and effective assistance of counsel.

G. The use of informers to obtain information for law enforcement officers has existed and had the approval of

courts for years in *United States v. Dennis,* 183 F. (2d) 201 (1950) Judge Learned Hand stated:

> "Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, and in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly. . . ."

In the present case both the State and Weatherford had a legitimate interest in maintaining his cover for as long as possible. He was working on numerous matters of importance to the law enforcement division and such an agent must always be concerned for his personal safety, once he has been identified.

H. The basic question presented by the present facts is whether an agent is under an affirmative duty to avoid all contacts with an accused and his attorney prior to trial. No decisions have been cited to sustain such a rule and none have been found by the Court. *Coplon* and *Caldwell* do not stretch far enough to cover the present facts. As stated at page 306 of *Hoffa v. United States,* 385 U. S. 293 (1966):

> "Both of those cases (*Caldwell* and *Coplon*) dealt with government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel."

Hoffa also explains the protection of the Fourth Amendment from unreasonable searches and seizures, which does not apply to the present facts.

I. It is strange that the plaintiff now contends that he was denied his constitutional rights to a fair trial by actions of agents of the State of South Carolina, but following the conviction in July 1970, he did not have sufficient confidence in these constitutional positions to perfect his appeal to the Supreme Court of South Carolina. Instead he fled the state and was a fugitive for approximately ten months. When he returned and was incarcerated, he still had available to him the Uniform Post-Conviction Procedure Act (Title 17-601 *et seq.* Code of Laws of South Carolina, 1962, as amended). He did not attack his conviction or sentence under this Act as being violative of his constitutional rights.

J. The plaintiff alleges that he was denied the right to plea bargain because of Weatherford's action and the surprise of his appearance as a witness. The record does not support this allegation, since there is nothing in the record to show that any plea bargaining was ever attempted by plaintiff or his attorney, or that it was impossible to bargain after the testimony of Weatherford.

K. Plaintiff also alleges mental pain and suffering caused by the circumstances in which Weatherford's identity was revealed. It must be remembered that this is an action brought for the alleged deprivation of constitutional rights. In order to recover damages there must be a proof of such deprivation, which has not been accomplished in this case. If the Court were to award such mental pain and suffering because of the appearance of an informer on the witness stand, we would have even more 1983 actions clogging the docket of this court.

L. Even if there were proof that Weatherford violated some constitutional right of Bursey, which there is not, there is no testimony connecting defendant Strom with any of such acts allegedly committed by Weatherford. Since the Doctrine of Respondent Superior does not apply in 1983 cases, there could be no finding against defendant Strom. See *Barrow v. Bounds,* Opinion 74-1731 4th Cir. Ct. of Appeals dec. July 1, 1974.

IT IS THEREFORE, ORDERED that judgment be entered for the defendants in this action.

AND IT IS SO ORDERED.

/s/ ROBERT F. CHAPMAN,
United States District Judge.

August 20th, 1974,
Florence, South Carolina.

True Copy.
Test:
MILLER C. FOSTER,
Clerk.
By: .....,
Deputy Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-2242
C. A. 73-665

Brett Allen Bursey, Appellant,

versus

Jack M. Weatherford, individually and in his official capacity as an agent of the South Carolina State Law Enforcement Division; Pete Strom, individually and in his official capacity as Chief of the South Carolina State Law Enforcement Division and other unknown agents and officials of the South Carolina State Law Enforcement Division, Appellees.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Robert F. Chapman, District Judge.

Argued October 10, 1975 Decided December 2, 1975

Before BOREMAN, Senior Circuit Judge, and CRAVEN and FIELD, Circuit Judges.

Laughlin McDonald (Neil Bradley, and Herbert E. Buhl, III, on brief). for Appellant; Joseph C. Coleman, Deputy Attorney General of South Carolina, and (Daniel R. McLeod, Attorney General of South Carolina, on brief) for Appellees.

CRAVEN, Circuit Judge:

Appellant Brett Allen Bursey brought this suit under 42 U.S.C. § 1983 seeking damages for alleged violations

under color of state law of his constitutional rights. He named as defendants Jack Weatherford, an informant-agent of the South Carolina State Law Enforcement Division (SLED), J. P. Strom, Chief of SLED, and other unknown SLED agents, all in both their individual and representative capacities. Bursey claimed, *inter alia*, violation of his rights to a fair trial and to effective assistance of counsel secured to him under the fifth, sixth, and fourteenth amendments, as a result of intrusion by Weatherford into conferences between him and his attorney preceding his trial for malicious destruction of property.

The district court, hearing this case without a jury, entered judgment against Bursey. It held that Weatherford's conduct did not violate appellant's constitutional rights. We disagree, reverse, and remand for further proceedings.

I

On July 27, 1970, Bursey was tried and convicted of the crime of malicious destruction of property. This charge arose out of an incident during the early morning hours of March 20, 1970, during which a brick was thrown through the window of the Richland County Selective Service office in Columbia, South Carolina, and red paint was sprayed and splattered on the outside and inside of the building. Bursey was sentenced to 18 months in prison and served his time.[1]

Jack Weatherford, an informant employed by the South Carolina State Law Enforcement Division (SLED), participated in damaging the draft board property and then arranged his own and Bursey's arrest. To maintain his "cover," Weatherford was ostensibly indicted along with Bursey for the crime of malicious destruction of property, and arrangements were made by Solicitor Foard for his apparent retention of a well-known local attorney as his defense counsel. The purpose of it all was to convince Bursey and others that Weatherford was in bad trouble so that he could maintain his appearance as an apparent co-

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[1] After his conviction, Bursey fled the state. In October 1972 he was returned to South Carolina and served 18 months in prison.

Bursey did not appeal his conviction, nor did he seek post-conviction relief under either state law or federal habeas corpus.

defendnt while actually working for Strom and Foard. While there is no evidence of Strom's direct personal supervision of these machinations, it is clear from his testimony that he expected Weatherford to continue working as an undercover agent on the University of South Carolina campus and that he entrusted the details of the operation to Solicitor Foard.

During this period after the indictment of Bursey but before his trial, on at least two occasions Weatherford was present at meetings between Bursey and his attorney, C. Rauch Wise, at which the coming trial was discussed. Appellees urge that the intrusion was not deliberate but, instead, was simply additional necessary "cover." Since Bursey thought Weatherford was a friend and partner in crime, the latter could not avoid association without endangering revelation of his law enforcement role. For that reason only, appellees insist, Weatherford intruded upon the privacy of counseling. But SLED encountered bad luck,[2] and soon it became evident that Weatherford could no longer work effectively as an undercover agent. Upon the request of Solicitor Foard, Strom agreed to allow Weatherford to testify against Bursey, a turn of events which Strom testified he did not anticipate at the time of Bursey's arrest. Doubtless surprised and dismayed, Bursey was convicted on Weatherford's eyewitness testimony.

II

The district judge made the following findings of fact which are particularly relevant to the issues presented on appeal:

> [1.] On two occasions following the employment of plaintiff's attorney, said attorney, the plaintiff and the defendant Weatherford met and the approaching trial was discussed. On neither of these occasions did the defendant Weatherford seek information from the plaintiff or his attorney, and on neither occasion did he initiate or ask for the meeting. . . .
> [2.] That following the various meetings with the plaintiff and/or plaintiff's attorney nor at any time did the defendant Weatherford discuss with or pass on to defendant Strom, any agents of SLED, or to Solicitor John Foard and/or any of his staff any details or information regarding the plaintiff's trial plans, strategy or anything having to do with the criminal action pending against plaintiff. . . .
> [3.] From the beginning Weatherford advised plaintiff and plaintiff's attorney that Weatherford would obtain a severance of his case from that of the plaintiff. . . . On no occasion did Bursey or his attorney question the granting of a severance nor did they seem to concern themselves with whether the prosecutor would consent to a severance; although such consent is quite unusual where codefendants are charged with the same crime and proof will be from the same witnesses based upon identical facts. . . .

[2] Weatherford and other SLED agents were seen and recognized by one of Bursey's friends while they were vacationing at Hilton Head Island, South Carolina, during the summer of 1970. According to Weatherford's testimony, Strom gave him permission to go on that trip (App. 171) in spite of the obvious danger of "blowing" his cover.

On these facts the district judge concluded that Bursey's constitutional rights had not been violated. He held in effect that: (1) there had been no "gross" intrusion upon the confidential relationship between Bursey and his lawyer because the participation in these conferences by Weatherford was not for the purpose of obtaining information concerning trial strategy, etc.; (2) Bursey had not been prejudiced as a result of Weatherford's presence during these conferences because their content had not been communicated to Solicitor Foard or Strom; and (3) Weatherford's actions, and especially his statements concerning severance of his trial, should "have put them [Bursey and his attorney] on notice that Weatherford might be an agent."

We disagree and conclude that on the facts as found by the district court Bursey's rights to effective assistance of counsel and a fair trial were violated.

III

Effective Assistance of Counsel

Ours is an adversary system of justice. Deliberately planting an informer in the council of trial preparation, or an electronic monitor, is, of course, a "gross" intrusion upon the confidentiality of the lawyer-client relationship protected by the sixth amendment. The Supreme Court has said so:

> Both of those cases [3] dealt with government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel.

Hoffa v. United States, 385 U. S. 293, 306 (1966) (footnote added). But we think it does not follow, as appellees urge, that the sixth amendment is violated only where there has been a "gross" intrusion into the attorney-client relationship. We agree with the Third Circuit that it is a waste of time to undertake to decide whether an intrusion may be characterized as "gross," [4] and that instead we should decide whether it is deliberate or inadvertent. Here it was not inadvertent but was knowingly permitted by the prosecution. [5]That the intrusion was not for the purpose of obtaining information but was to maintain Weatherford's cover is, we think, of no consequence. [6]We conclude that whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial.

We think *Black v. United States*, 309 U. S. 26 (1966), and *O'Brien v. United States*, 386 U. S. 345 (1967), read together, establish such a *per se* rule. In *O'Brien*, a defendant's conversation concerning his forthcoming trial was monitored, but the conversation was not mentioned in any FBI report, nor were its contents communicated to attorneys for the Department of Justice, including those who prosecuted the case. Nevertheless, the Supreme Court sum-

[3] *Caldwell v. United States*, 205 F. (2d) 879 (D. C. Cir. 1953), *cert. denied*, 349 U. S. 930 (1955), and *Copland v. United States*, 191 F. (2d) 749 (D. C. Cir. 1951), *cert. denied*, 342 U. S. 926 (1952).

[4] *United State sv. Rispo*, 460 F. (2d) 965 (3d Cir. 1972).

marily vacated the judgment below and remanded for a new trial.[5]

We put aside cases such as *United States v. Rosner*, 485 F. (2d) 1213 (2d Cir. 1973), *cert. denied*, 417 U. S. 950 (1974), and *United States v. Mosca*, 475 F. (2d) 1052 (2d Cir.), *cert. denied*, 412 U. S. 948 (1973), as clearly inapplicable. As the court in *Rosner* said, the fact situation there was wholly different from our situation—that of the "dummy defendant, the ultimate in the chicancery of unlawful intrusion. . . ." *Rosner, supra* at 1227.

In the context of a civil suit, our holding that Bursey's sixth amendment right to counsel was violated sustains his suit irrespective of any showing of substantial prejudice to his defense. *Via v. Cliff*, 470 F. (2d) 271, 275 (3d Cir. 1972). However, prejudice may be very relevant to the issue of damages,[6] and we note the record establishes that Weatherford, fully acquainted with Bursey's trial strategy, talked with Solicitor Foard, who prosecuted the case, before trial and, of course, testified against Bursey. On these facts we find him to have been a member of the prosecution and further note that in an adversary system learning the plans of one's opponent, as Weatherford did, is generally thought to be worthwhile. Indeed, espionage rests upon such a premise.

Fair Trial

We also hold that Bursey's rights to a fair trial were violated by the government's countenancing of Weatherford's role in this case. *Brady v. Maryland*, 373 U. S. 83 (1963). In *Brady* the Court held that the prosecution had a duty under the due process clause to insure that "criminal trials are fair" by disclosing evidence favorable to the defendant upon request. Here appellees insist that state officers may conceal the identity of an informant from a defendant during his trial preparation, that the informant

[5] We need not presently decide the correct rule in a case of inadvertent intrusion, but we are inclined to agree with the Third Circuit that in such a case there would be constitutional error requiring a new trial unless it is found to be harmless beyond a reasonable doubt within the meaning of *Chapman v. California*, 386 U. S. 18 (1967). *United States v. Rispo*, 460 F. (2d) 965, 977 (3d Cir. 1972).

[6] *Via, supra* at 275 n. 3.

can deny up through the day before his appearance at trial that he will testify against the defendant, and that he can then testify with devastating effect—all without impairing a fair trial. We think not. Deception is an appropriate instrument in crime solution. It is inappropriate and highly suspect when utilized **after** indictment with the effect of lulling a defendant into a false sense of security and thus denying him the opportunity (1) to consider whether plea bargaining might be the best course, (2) to do a background check on Weatherford for purposes of cross examination, and (3) to attempt to counter the devastating impact of eyewitness identification.

We wholly disagree with the court below that Weatherford's conduct and his indication that he would seek a severance of his own trial should have put Bursey and his lawyer on notice "that Weatherford might be an agent." We think otherwise, but if we did not, we would nevertheless hold that whether Bursey and his lawyer should have been able to discern the deception is irrelevant. It is not a defense for appellees to show that in spite of the prosecutor's best efforts to conceal the truth a more astute victim might not have been deceived. Such an approach is a caricature of the *Brady* principle.

IV

The district court found that "there is no testimony connecting defendant Strom with any . . . acts allegedly committed by Weatherford . . . [and] [since the Doctrine of *Respondeat Superior* does not apply in 1983 cases, there could be no finding against defendant Strom." The court's factual finding is clearly erroneous and its legal analysis is incorrect.

The testimony of Strom at trial shows that (1) he participated in the decision to maintain Weatherford's cover; (2) he entrusted the details of perfecting the cover to Solicitor Foard, who was at his office the day of the arrest; and (3) that he concurred personally in the decision to allow Weatherford to testify. App. 109-11. Furthermore, according to appellees' own argument on appeal, contact of the type which occurred in this case and violated Bursey's

constitutional rights was absolutely essential to the continued viability of Weatherford as an undercover agent in view of his "close relationship" with Bursey. Brief for Appellees at 4. This is therefore not at all a case involving liability through the principle of *respondeat superior*. That concept applies only to an innocent master being held vicariously liable for the acts of his servant. Here Strom's own decisions directly caused the violation of Bursey's constitutional rights, and that is a separate basis for liability. 2 F. Harper & F. James, The Law of Torts 1362, 1366 (1956); W. Prosser, Law of Torts 460 (4th ed. 1971). We here simply read 42 U.S.C. § 1983 "against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U. S. 167, 187 (1961).[7]

V

On appeal Weatherford and Strom argue that in any case they cannot be found personally liable absent "a showing of bad faith, malice or recklessness."[8] We disagree.

In *Wood v. Strickland*, 420 U. S. 308 (1975), the Supreme Court set down the following statement of the "qualified good faith" test in the specific context of school discipline:

> [W]e hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took

---

[7] In *Barrow v. Bounds*, No. 74-1731 (4th Cir. July 1, 1974), we stated:

> We agree with the majority of federal courts which have considered the question that where, as here, money damages are sought pursuant to 42 U. S. C. § 1983, some personal involvement by the defendant is required; the doctrine of *respondeat superior* does not apply.

Id. at 2-3.

We believe that the requirement of "personal involvement" is satisfied in this case by the actions and decisions of Strom. *See Curtis v. Everette*, 489 F. (2d) 516, 521 (3d Cir. 1973), *cert. denied*, 416 U. S. 995 (1974); *Wright v. McMann*, 460 F. (2d) 126, 134-35 (2d Cir.), *cert. denied*, 409 U. S. 885 (1972).

[8] We note that if the suit against Weatherford and Strom in their representative capacities is not barred by the eleventh amendment, the defense that they acted in good faith is inapplicable. *Thomas v. Ward*, No. 74-1541 (4th Cir. Nov. 24, 1975).

within his sphere of official responsibility would violate the constitutional rights of the student affected. . . .

Id. at 322. Although this test was stated specifically in the context of school discipline, we think it applicable to the conduct of appellees. Qualified immunity, of course, depends upon weighing the "scope of discretion and the responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action. . . ." *Scheuer v. Rhodes*, 416 U. S. 232, 247 (1974). *See also O'Connor v. Donaldson*, 43 U.S.L.W. 4929, 4934 (U. S. June 26, 1975); *Knell v. Bensinger*, 44 U.S.L.W. 2184 (7th Cir Sept. 26, 1975).

Because he proceeded to decide the case on other grounds, the district judge had no occasion to rule on *Strickland*-type good faith defense, and indeed, it does not appear that the defense was tendered below. It is, however, argued on appeal, and we think the appellees are entitled to assert it in further proceedings on remand.[9]

REVERSED AND REMANDED.

[9] While we do not undertake to decide this question on the record before us, we note that the testimony given by Strom below may be read to mean that he "reasonably should have known that the action he took within his sphere of official responsibility would violate [Bursey's] constitutional rights. . . ." *Wood, supra* at 322. He testified that he knew that sending an agent into a conference between a criminal defendant and his attorney would violate the defendant's sixth amendment rights. App. 116. He also testified that if he had known the day after Bursey's arrest that Weatherford was going to testify against him, he would have called him off the case and "wouldn't have had him to meet with them" (App. 114), but he then assented to Solicitor Foard's request that Weatherford testify against Bursey.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-665

Brett Allen Bursey, Appellant,

versus

JACK M. WEATHERFORD, Individually, and in his official capacity as an agent of the South Carolina Law Enforcement Division, PETE STROM, Individually, and in his official capacity as Chief of the South Carolina State Law Enforcement Division; and other unknown agents and officials of the South Carolina State Law Enforcement Division, Appellees.

APPELLEES' PETITION FOR REHEARING AND MOTION FOR REHEARING EN BANC

Defendants-Appellees respectfully petition the Court, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, for a rehearing of this appeal, and move pursuant to Rule 35 of the Federal Rules of Appellate Procedure for a rehearing *en banc*.

The points of law and fact which in the opinion of the appellees the Court has overlooked or misapprehended are:

I

Effective Assistance of Counsel

A. **The Court misapprehended the Supreme Court cases of Black and O'Brien.**

This Court holds that the mere presence of an undercover agent during attorney-client conversations violated the Sixth Amendment right to effective assistance of counsel, irrespective of the reasons for the agent being there.

Black v. United States, 363 U. S. 26 (1966), and *O'Brien v. United States,* 386 U. S. 345 (1967), are cited as establishing such a rule. [Order at 6.] The *Black-O'Brien* rule is construed in *Bursey* to hold that whenever there is any kind of intrusion into the attorney-client relationship requiring reversal of a criminal conviction and a new trial, the Sixth Amendment right to effective assistance of counsel has been abridged. It is respectfully suggested that neither *Black* nor *O'Brien* establish such a *per se* rule.

Reversal and new trial in *Black* and *O'Brien* were ordered "so as to afford the petitioner an opportunity to protect himself from the use of evidence that might be otherwise inadmissible" and to "give the parties an opportunity to present the relevant evidence and permit the trial judge to decide the questions involved." *Black v. United States,* 385 U. S. 26, 87S. Ct. 190, 17 L. Ed. (2d) 26, 29. Had the intrusion alone been sufficient to establish denial of effective assistance of counsel, outright reversal would have followed instead of a new trial. If it had already been established that the criminal defendant had been denied the effective assistance of counsel, no further finding of a trial judge could correct the situation.

In both *Black* and *O'Brien* the dissenting opinions of Justices Harlan and Stewart quarrel with procedure only, arguing that the Supreme Court in reversing the convictions as an appropriate vehicle for sorting out the eavesdropping issue "puts the cart before the horse." 19 L. Ed. (2d) at 96. The dissenting opinion in *Black* states:

> ". . . I would remand the case to the District Court for a full hearing as to the circumstances and effects of these activities." 18 L. Ed. (2d) at 97.

It is urged that the *Black* and *O'Brien* cases do not hold that intrusion alone establishes denial of Sixth Amendment rights to effective assistance of counsel, but that they hold that the fact of intrusion requires full inquiry into the circumstances in order to determine whether or not such denial has taken place.

B. A full inquiry into the circumstances surrounding the alleged intrusion into the attorney-client relationship has already disclosed no prejudice to the plaintiffs' defense and no denial of the effective assistance of counsel.

In the case at bar the District Court found as a fact the following:

> "That following the various meetings with the plaintiff and/or plaintiff's attorney nor at any other time did the defendant Weatherford discuss with or pass on to defendant Strom, any agents of SLED, or to Solicitor John Foard and/or any of his staff any details or information regarding the plaintiff's trial plans, strategy or anything having to do with the criminal action pending against plaintiff. Until the morning of the 27th of July, 1970, Weatherford did not know he would be used as a witness in the criminal action and Solicitor Foard had not decided, until just prior to the call of the case, that he would use Weatherford as a witness. Up until that time he intended to use as the primary witness for identification of Bursey and his participation in the crime one William Burt Finney, III, a student at Clemson University, who knew Bursey, had met him on the night of March 19, 1970, and had written out for Bursey the note which was attached to the brick found inside the Selective Service Office."
>
> "The defendant Weatherford did not in any way interfere with the plaintiffs' right to assistance of counsel or right to trial nor did he obtain any information from plaintiff or his attorney amounting to an illegal search and seizure. No information following arrest of plaintiff or following his employment of counsel was relayed by Weatherford to any agent of SLED or person connected with the prosecution of the case."

After a full inquiry the District Court found as a fact that the intrusion, if any, did not have any effect upon plaintiffs' effective assistance of counsel. There was no prejudice shown; therefore, under *Black* and *O'Brien* there was no denial of the effective assistance of counsel.

C. **The Court misapprehended the law by failing to consider the legitimate state interest in the maintenance of Weatherford's cover.**

Bursey has salient facts that were present in neither *Black nor O'Brien.* Testimony was that there was a legitimate state interest in protecting the agent's "cover" in *Bursey, viz.,* (1) the agent's continuing role as an undercover agent, and (2) danger to the agent if his true identity was known. No such argument was made in *Black* or *O'Brien* because the facts did not support it.

By its ruling in *Bursey,* this Court brushes aside the "legitimate state interest" argument as "of no consequence," thus holding without qualification or explanation that there is no conceivable set of circumstances in which a balancing of interests may justify the presence of an agent at attorney-client conversations. The motor vehicle search cases have long ago established that there must be such a balancing of interestsin on-the-road search and seizure cases between the right of the individual to be secure in his person and property, and the right of government to effective enforcement of the criminal laws.

Black and *O'Brien* involved the monotoring of attorney-client conversations by mechanical means, something that cannot be said to serve a legitimate governmental interest. It is urged that a rehearing in this matter is necessary for a full consideration of the "legitimate state interest" and "balancing of rights" questions raised.[1]

[1] It is further urged that the limiting effect of this Order upon law enforcement involves a question of exceptional importance.

II

Fair Trial

The Court in its Order seems to hold that a prosecutor on his own initiative must reveal the names of all his witnesses to a defendant prior to trial, and in time to allow defendant adequate time to investigate such witnesses. For this wholly unsupported proposition the Court cites *Brady v. Maryland,* 373 U. S. 83 (1963).

In *Brady* the Court said:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material. . . ." *Id.* at 87.

Nowhere in *Brady* does it say that the prosecutor is required to give the defendant his entire case to include the names of all witnesses. *Brady* is concerned only with the prosecution withholding exculpatory information, and then only when the defendant requests it. In this case it can hardly be said that informer Weatherford's identity and testimony were exculpatory; indeed, they were just the opposite.[2]

The Court's Order is without support in *Brady* or elsewhere when it states that the failure to reveal an informant's identity after an indictment denies the individual a fair trial.

It is respectfully submitted that the State has the right and indeed the duty to utilize undercover agents and that the indictment of one defendant does not require the State to disclose that agent's cover.[3] The Court has attempted to expand *Brady* far beyond its holding and indeed far beyond any subsequent holding concerning a prosecutor's duty to reval his case.

[2] Furthermore, plaintiff's lawyer did not make any requests for information.

[3] *See* discussion page 5, *supra.*

III

Liability of Defendant Strom—Respondeat Superior

A. **There is no evidence that defendant Strom knew that agent Weatherford had on two occasions met with Bursey and Bursey's attorney, and therefore Strom cannot be held liable under 42 U.S.C. § 1983.**

The district court found that "there is no testimony connecting defendant Strom with any of such acts allegedly committed by Weatherford." App. at 29. This Court held that this finding of fact by the district court was "clearly erroneous," and that "Strom's own decisions directly caused the violation of Bursey's constitutional rights." Order at 11. The decisions of Strom to which the Court refers are: (1) the decision to maintain Weatherford's cover; (2) the decision to allow Solicitor Foard to work out the details of maintaining Weatherford's cover; and (3) the decision to allow Weatherford to testify.

It is respectfully submitted that the district court was correct in its finding that Strom had no connection with the actions of Weatherford. To prove that Strom participated in the deprivation of Bursey's constitutional rights, it is essential that Strom have knowledge of Weatherford's meeting with Bursey and Bursey's attorney. The record, however, clearly establishes that Strom had no knowledge of Weatherford's activities subsequent to his arrest.

> Q. **Had you known** what was going on with Mr. Weatherford and Mr. Bursey and Mr. Wise, would you have permitted that to continue?
>
> A. I don't think it went on, because you have got other witnesses that will testify in this case, and, of course, you'll have to find out what happened. **Nobody reported it to me.** App. at 116-17 (Cross examination of defendant Strom) (emphasis added).

See also App. at 131-32, 160.

The Court, finding no direct knowledge on the part of Strom, relies on three of his "decisions" that are unrelated to the plaintiff's alleged constitutional deprivations. Strom's decisions to maintain Weatherford's cover

and to entrust this matter to Solicitor Foard are not, by any stretch of the imagination, tantamount to requesting Weatherford to intrude upon the attorney client relationship. Likewise, Strom's approval of the use of Weatherford as a witness concerned the dissolution of Weatherford's cover, and not the approval of Weatherford's intrusion, if any.

It is respectfully submitted that the Court's finding of fact that Strom caused the violations of Bursey's constitutional rights is clearly erroneous. As the district court found, there is no evidence connecting Strom with Weatherford's acts.

B. **The Court's above-mentioned erroneous finding of fact led to the misapplication of the doctrine of respondeat superior.**

The Court concluded that liability through the doctrine of *respondeat superior* does not apply to this case because that doctrine only applies to an "innocent master being held vicariously liable for the acts of his servant." Order at 11. Absent a finding of fact that defendant Strom either directed or knew of agent Weatherford's activities with Bursey and Bursey's attorney, Strom is an innocent master. The district court held, and the record clearly reveals, that Strom knew nothing about Weatherford's meetings with Bursey and Bursey's attorney. The Court circumvented existing Fourth Circuit precedent, *Barrow v. Bounds,* No. 74-1731 (4th Cir. July 1, 1974), by relying on certain decisions of Strom. Order at 11. None of these decisions, however, mandated the alleged violation of Bursey's constitutional rights.

The decisions of Strom all related to whether or not to keep Weatherford's cover. The constitutional rights of Bursey could not have been a factor in Strom's decisions because Strom did not know of Weatherford's meetings with Bursey's attorney. Therefore, Strom can only be held liable in this case if the doctrine of *respondeat superior* is applied.

The doctrine of *respondeat superior* is inapplicable to 1983 suits. *Barrow v. Bounds, supra.* Likewise, there can

be no imputed knowledge as to defendant Strom; he cannot be held to know all that his employees know. *Bennett v. Gravelle*, 451 F. (2d) 1009 (4th Cir. 1971), *affirming*, 323 F. Supp. 203 (D. Md. 1971). While the appellees agree with the Court that Strom is responsible for the natural consequences of his actions (Order at 12), it is respectfully submitted that any violation of Bursey's rights were not the natural consequences of Strom's decisions.

Defendant Strom must decide the cases to which all his employees are assigned. Under the Court's opinion, Strom can now be held personally liable for any of the acts of his employees simply because he made an unrelated decision about that employee or that case. Strom's lack of knowledge about the employee's activities is apparently irrelevant. It is respectfully submitted that this is not now, and has never been, the law of the United States, the Fourth Circuit or the State of South Carolina.

IV

Plaintiff's Burden of Proof in 1983 Actions

The opinion of this Court, in effect, states that all a plaintiff need show in order to support a 42 U.S.C. 1983 action for damages is the denial of a constitutional right.[4] The Court bases this on the *Wood v. Strickland*[5] test as quoted in the *Bursey* Order at 13. It is respectfully pointed out that the *Wood v. Strickland* test is a defense and does not arise until plaintiff makes a *prima facie* showing to support a 1983 action for damages. It is in this regard that it is respectfully suggested that the Court misapplied the law and has confusedprior case law of the 4th Circuit.[6]

In its Order, the Court does not discuss or recognize the defendant's position that any denial of a constitutional right, if any, had to be proven by plaintiff to be the result of an intentional act of defendants or that defendants acted

[4] *Bursey* Order at 12.
[5] 420 U. S. 308 (1975).
[6] The apparent conflict between this case and prior cases supports the granting of an *en banc* hearing.

with reckless, gross and culpable negligence.[7] Until the plaintiff carries the burden of proving one of the two standards, any good faith defense would not come into play. Therefore, the Court's consideration of *Wood v. Strickland* as demonstrating the type of conduct which a plaintiff must prove is erroneous; *Wood v. Strickland* describes the defense of a public official alleged to have acted intentionally or recklessly. It is apparent that absent the initial showing of at least recklessness, *Wood v. Strickland* could not apply.

Upon remand, if this Court should find that plaintiff's constitutional rights were abridged, the lower court has the duty to examine the circumstances to determine if the defendants acted intentionally to deprive the plaintiff of a constitutional right or if the defendants acted with reckless, gross and culpable negligence.

It is submitted that upon a finding that plaintiff has made a case to support a 1983 action, then, and only then, would the Court utilize the *Wood v. Strickland* test to determine if the defendants enjoy what has been referred to as a qualified immunity of a varying scope. *Scheuer v. Rhodes*, 416 U. S. 232 (1974).[8]

The Order as written leaves the standard and burden of proof in 1983 actions in a state of confusion and apparent conflict from one 4th Circuit case to another.

Defendants, in the event this Court decides against them on the three prior questions, urge upon this Court the duty to recognize the "negligence is not enough" requirement of *Street v. Surdyker*, prior to considering a *Wood v. Strickland* defense.

[7] E.g., *Street v. Surdyker*, 492 F. (2d) 368 (4th Cir. 1974); *Jenkins v. Averett*, 424 F. (2d) 1228 (4th Cir. 1970).
[8] In footnote 8 of the *Bursey* Order, the Court makes an unsolicited and erroneous statement that *Thomas v. Ward*, No. 74-1541 (4th Cir. Nov. 24, 1975), holds that if the Eleventh Amendment does not bar the suit against state officials in their representative capacity, then the good faith defense does not apply. The *Thomas v. Ward* case does not so hold and does not support such a conclusion; that case concerns only equitable relief which this Court recognizes to be governed by principles separate and distinct from those utilized when relief is sought in the form of legal damages. *Burt v. Board of Trustees*, 521, F. (2d) 1201 (4th Cir. 1975).

CONCLUSION

For the foregoing reasons, defendants- appellees request that the appeal be reheard *en banc* and the judgment of the district court be affirmed.

Respectfully submitted,

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December 16, 1975.

[Certificate of mailing and affidavit omitted in printing.]

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 75-1510

JACK M. WEATHERFORD, Individually and in his official capacity as an agent of the South Carolina Law Enforcement Division, PETE STROM, individually and in his official capacity as Chief of the South Carolina State Law Enforcement Division; and other unknown agents and officials of the South Carolina State Law Enforcement Division,

Petitioners,

vs.

BRETT ALLEN BURSEY

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
Questions Presented	1
Statement	2
Argument	9
I. The Decision Below is Plainly Correct.	9
II. There is No Conflict Among the Circuits.	12
III. The Findings Below are Not Clearly Erroneous.	13
Conclusion.	14

CITATIONS

Cases:

Black v. United States, 385 U.S. 26 (1966)	9, 10
Brady v. Maryland, 373 U.S. 83 (1963)	11

Cases: Page

Caldwell v. United States,
205 F.2d 879 (D.C. Cir. 1953)
cert. den., 349 U.S. 930, reh.
den., 349 U.S. 969 (1955) 12
Coplon v. United States,
191 F.2d 749 (D.C. Cir. 1951)
cert. den., 342 U.S. 976 (1952) . . . 12
Estes v. Texas,
381 U.S. 532 (1965) 10
Glasser v. United States,
315 U.S. 60 (1942) 10
Hoffa v. United States,
385 U.S. 293 (1966) 12
Lewis v. Brautigam,
227 F.2d 124 (5th Cir. 1955). 12
Marland v. Heyse,
315 F.2d 312 (10th Cir. 1963) 12
O'Brien v. United States,
386 U.S. 345 (1967) 9, 10
Peters v. Kiff,
407 U.S. 493 (1972) 10
Taglianetti v. United States,
398 F.2d 558 (1st Cir. 1968), aff'd
394 U.S. 316 (1969) (per curiam). . . 12
United States ex rel. Cooper v. Denno,
221 F.2d 626 (2d Cir. 1955) cert. den.
sub nom. Cooper v. Denno, 349 U.S.
968 (1955). 12
United States v. Rispo,
460 F.2d 963 (3rd Cir. 1972). 12
Via v. Cliff,
470 F.2d 271 (3rd Cir. 1972). 12
Wakat v. Harlib,
253 F.2d 59 (7th Cir. 1958) 12

Statutes:
42 U.S.C. §1983 7

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

I. Whether respondent was denied effective assistance of counsel and a fair state court trial where a paid informer posing as a co-defendant infiltrated the defense

camp, affirmatively misled respondent as to his true identity, participated in attorney-client discussions, collaborated with the prosecution, subsequently testified against the respondent at the state trial, and where respondent was demonstrably prejudiced by the deceptive practices?

II. Whether the chief of the South Carolina State Law Enforcement Division is liable for violations of respondent's right to counsel and a fair trial where his own decisions directly caused the deprivations?

STATEMENT

Jack Weatherford was hired by Pete Strom, Chief of the South Carolina State Law Enforcement Division (SLED), in August, 1969, as an undercover agent. His assignment was to infiltrate the University of South Carolina and keep Strom informed about what was happening on the campus.

As part of his SLED duties, Weatherford joined a University chartered discussion group known as AWARE where he met Brett Bursey, also a student at the University. The two subsequently became close friends. As a result of their mutual opposition to the war in Vietnam, Weatherford, Bursey and

several others met on March 19, 1970, and planned a demonstration before the Richland County Selective Service Board to celebrate National Anti-Draft Week. The group decided to go to the draft board later that night, paint anti-war symbols on the building and throw a bottle of paint and a brick with an anti-war note tied to it through a window. After the meeting, Weatherford notified Strom of the plan, but neither made any attempt to stop it.[1]

Weatherford, Bursey and one Greg Merrick carried out the defacing of the local board in the early A.M. hours of March 20, 1970. A fourth person, Dan Bolding, drove the getaway car. Both Bursey and Weatherford painted a peace symbol on a wall and each threw a brick. Weatherford subsequently called SLED and made arrangements for his and Bursey's arrest. SLED agents arrested the two later during the day as they were attending a Student Affairs Committee Meeting at the University. They were handcuffed together and taken to the Richland County Sheriff's office. Bursey remained in jail for approximately 12 days due to difficulties in raising his $12,500 bond. Weatherford was released to fellow agents within hours of his arrest and taken out of town for several days. In the meantime, Bursey, who was still in custody, was told by SLED agents that Weatherford was also in jail. Following Bursey's release

---

1. Strom didn't "instruct him to stop it ... [because] we never would have a violation and all the thieves and crooks would be going wild."

he and Weatherford met and Weatherford confirmed the fabrication that he had been in jail for several days before making bail. Weatherford and Bursey were later indicted as co-defendants by the county solicitor for malicious destruction to real and personal property.

To maintain the ruse that Weatherford was a bona fide co-defendant, the solicitor made arrangements for a local attorney to appear to represent Weatherford. "I told him [the attorney] I didn't want anybody, including people in his office to know that this man was an undercover agent."

Bursey's attorney met with Weatherford's attorney to discuss their clients' cases. Weatherford's lawyer "agreed there was an informant" but "had no idea who the informant was." He indicated that he would seek a separate trial for his client.

Bursey and Weatherford met with Bursey's attorney on several occasions. On at least two of these Bursey and Weatherford's trials were discussed in detail. The first meeting was arranged by Bursey and took place at his home in mid-April shortly after his release from jail. The lawyer and the co-defendants discussed the pending cases generally and whether or not there might be an informer, Weatherford's representation and his plans to seek a severance. Weatherford stated that an informer could be involved and expressed the opinion that perhaps Merrick was an agent since he had never been arrested and charged.

The three also discussed whether or not Weatherford might be approached by law enforcement officers to secure testimony against Bursey in consideration of leniency for Weatherford's brother who was at that time serving a sentence for burglary. Weatherford denied that he had been approached by law enforcement officers and stated that he would not cooperate with them. The three also discussed trial tactics, including the testimony Merrick might give and the testimony the state would have available if Merrick did not testify.

Sometime after the meeting and prior to Bursey's trial Weatherford went to the beach for a weekend vacation with fellow SLED agents. While there he thought he was seen by a friend of Bursey's. To preserve the co-defendant deception, Weatherford got in touch with Bursey upon his return to the University and told him that his family and friends of his family had insisted that he discuss his case with the police; accordingly, he had met with SLED agents at a seaside resort at Hilton Head, South Carolina; they urged Weatherford to testify against Bursey but he had refused to do it. Weatherford assured Bursey that he would not cooperate with the prosecution.

The second formal attorney-client meeting in which Weatherford participated took place at the home of a mutual friend shortly before Bursey's July 27, 1970, trial. The matters discussed at the first meeting were discussed again, as well as legal strategies and tactics which had been developed during the interim. At that time it was known that Merrick was

out of the country and could not be present as a witness at the trial. The discussion turned to whom the witnesses might be against Bursey. Weatherford again denied that he would testify against Bursey or be a witness for the state. He also agreed not to be present in the courtroom on the day of Bursey's trial. Bursey and Weatherford had discussed the possibility of Weatherford's being subpoenaed but concluded that in such instance he would have available the fifth amendment privilege against self-incrimination. Final defense strategy was also discussed at the meeting, that in Merrick's absence and the absence of testimony from Weatherford the state would not be able to prove by direct testimony that Bursey was present at the local board. It was also determined that under the circumstances Bursey would not testify.

Prior to his state trial, Bursey filed a motion for discovery of the identity of informants. The motion was denied. When Bursey's case was called for trial, the prosecution's first witness was Weatherford. He implicated Bursey fully and directly in the crime charged.

Weatherford's testimony and his disclosure as an informer dramatically altered the defense tactics. It was determined that Bursey would have to testify. As for Bursey's attorney, the revelation of Weatherford's identity "completely changed the complexion of the case in a matter of a few minutes. It -- needless to say -- disoriented me" and impaired his ability to conduct the defense. Bursey was convicted of malicious destruction to real property and sentenced to eighteen months imprisonment.

Weatherford's general duties as an agent at the University remained the same following Bursey's arrest, and his original instructions were not modified in any way. As part of his continuing role of undercover agent, Weatherford helped trash the Administration Building in protest over the Kent State killings and the escalation of the war in Vietnam. He also applied for membership in the Venceremos Brigade and continued to counsel with his co-defendant. On one occasion he advised Bursey to jump bail and flee the jurisdiction.

During the time Weatherford was an agent, he and Strom kept in constant contact with each other, usually by telephone. They also conferred when Weatherford came to SLED headquarters every other week to pick up his pay check. Both Weatherford and Strom knew from the beginning that Weatherford might be a witness against Bursey. Weatherford "was prepared to be called into Court at any time for any case." Strom understood that "at some point in time on all your big cases . . . you have to let them testify, and then you give them a regular job and give them another assignment."

After conviction and service of sentence, Bursey brought the instant action for damages under 42 U.S.C. §1983. The district court dismissed the complaint, ruling that Bursey had not been denied constitutional protection and that there was no evidence connecting Strom with any of the acts committed by Weatherford. The court of appeals reversed on the grounds that Bursey's right to counsel and a fair

trial had been abridged where the state "knowingly arranges or permits intrusion into the attorney-client relationship." The court found that "Strom's own decisions directly caused the violation of Bursey's constitutional rights" and remanded the case for determination if he and Weatherford were entitled to the benefit of a "Strickland-type good faith defense." App. A at 21, 24-5.

ARGUMENT

I. The Decision Below is Plainly Correct.

The intrusion upon the attorney-client relationship in this case was even more egregious than those condemned in Black v. United States, 385 U.S. 26 (1966), and O'Brien v. United States, 386 U.S. 345 (1967), upon which the lower court relied. In Black, the Solicitor General advised the Court that prosecuting attorneys had been in possession of monitored attorney-client conversations even though the prosecuting attorneys were unaware that the surreptitious monitoring included attorney-client matters. Nonetheless, the conviction was vacated and a new trial ordered. In O'Brien, the Solicitor General informed the Court that the Federal Bureau of Investigation had electronically monitored conversations with the defense attorney concerning an application relating to the territorial conditions of O'Brien's bail. Conversations were summarized in FBI logs but were not communicated to the attorneys for the Department of Justice. Again, the Court summarily vacated the conviction. The intrusions in Black and O'Brien were by agents said to be unconnected with the prosecution, and neither of the defendants was affirmatively misled about the nature of the government's case. The instrusions here were arranged and permitted by the prosecution itself and Bursey was deliberately deceived as to the strength of the state's case. If the former violate the right to counsel, of necessity must the later.

Weatherford and Strom argue that (1) this case involves "mere presence" of an informer at defense counsels, (2) no direct proof that disclosure was made to the prosecution was adduced with the result that (3) no actual prejudice to Bursey was shown and no constitutional violations made out.

1. Mere presence. The court of appeals properly concluded that as a factual matter this was not a case of "mere" or "inadvertant intrusion." App. A at 22, n. 5.

2. Proof of disclosure. As Black and O'Brien made clear, proof of actual disclosure is not an element of interference with the right to counsel and a fair trial. Nonetheless, the record shows that Weatherford had full knowledge of the entire defense tactic, that he not only had the opportunity to make disclosure to the prosecutor but did in fact consult with him prior to trial and later testified as the state's chief witness. Unless Weatherford or the prosecutor can be expected to condemn themselves out of their own mouths, a more convincing showing of disclosure could hardly be made.

3. Actual prejudice. Black and O'Brien and numerous other decisions of this Court have consistently held that proof of actual prejudice is not a condition for denial of the rights to counsel and a fair trial, e.g. Peters v. Kiff, 407 U.S. 493 (1972); Glasser v. United States, 315 U.S. 60 (1942); Estes v. Texas, 381 U.S. 532 (1965). But even if such was Bursey's burden, he carried it in this case. As the court of appeals found,

the prejudice to him included the denial of the opportunity to consider whether plea bargaining might be the best course,[1] to do a background check on Weatherford for purposes of cross-examination,[2] and to attempt to counter the devestating impact of eyewitness identification.

The court below was plainly correct in concluding that whenever the state "knowingly arranges or permits intrusions into the attorney-cleint relationship, the right to counsel is sufficiently endangered" to violate the Sixth Amendment. App. A at 21. The court was also correct in finding that the post-indictment deception practiced in this case by the government violated Bursey's right to a fair trial. Brady v. Maryland, 373 U.S. 83 (1963).

---

1. Because he was deceived about the strength of the state's case, Bursey made no serious effort at plea bargaining prior to trial. Following Weatherford's testimony, however, a short recess was taken and his attorney discussed the possibility of entering a plea. The trial judge indicated that if a plea was entered Bursey would be sentenced to one year on each of the two counts against him to run consecutively. Bursey concluded that his plea bargaining position was diminished after the trial had started and rejected the proffered sentence.

2. Weatherford was subject to impeachment. Following the trial, Bursey's attorney learned that Weatherford had been arrested on a narcotics charge earlier in 1969 and that the charges were dismissed in consideration of Weatherford's doing undercover work for SLED.

II. There is no Conflict Among the Circuits.

Petitioners state in their reasons for granting the writ that there are conflicting decisions among the circuit courts concerning the use of undercover agents. No such cases appear, however, in argument. Bursey is unaware of any cases which in fact conflict with the holding of the court below.[1] The circuits seem uniformly to follow the principles set out in this case. Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), cert. denied, 342 U.S. 976 (1952); Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953), cert. denied, 349 U.S. 980, reh. denied, 349 U.S. 969 (1955); United States v. Rispo, 460 F.2d 963 (3rd Cir. 1972); Taglianetti v. United States, 398 F.2d 558, 570 (1st Cir. 1968), aff'd, 394 U.S. 316 (1969) (per curiam); United States ex rel. Cooper v. Denno, 221 F.2d 626 (2nd Cir. 1955), cert. denied sub nom. Cooper v. Denno, 349 U.S. 968 (1955); Via v. Cliff, 470 F.2d 271, 275 (3rd Cir. 1972); Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955); Wakat v. Harlib, 253 F.2d 59 (7th Cir. 1958); and, Marland v. Heyse, 315 F.2d 312, 313 (10th Cir. 1963). Also see, Hoffa v. United States, 385 U.S. 293 (1966).

1. In United States v. Zarzour, 432 F.2d 1, 3 (5th Cir. 1970) the agent "in no way acted on behalf of the government regarding" the defendant's trial. In United States v. Rosner, 485 F.2d 1213, 1224 (2d Cir. 1973) there was no "intrusion" while in United States v. Mosca, 475 F.2d 1052 (2d Cir. 1973), there was no opportunity for prejudice.

III. The Findings Below are not Clearly Erroneous.

The court of appeals correctly concluded that Strom's own decisions directly caused the violation of Bursey's constitutional rights. Strom recruited Weatherford, instructed him to infiltrate the University, participated in the decision to maintain his cover after the draft board incident, entrusted the details of perfecting the cover to Weatherford and the prosecutor, instructed and allowed Weatherford to continue as an agent on the same assignment at the University after Bursey's arrest and indictment even though he knew that at "some point in time" he would "have to let . . . [Weatherford] testify," conferred with Weatherford on a regular basis, and concurred personally in the decision to allow Weatherford to take the stand against Bursey. The finding that Strom was directly connected with the unlawful acts of Weatherford is clearly correct.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

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No. 75-1510

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

JACK M. WEATHERFORD, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN AGENT OF THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION, PETE STROM, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHIEF OF THE SOUTH CAROLINA STATE LAW ENFORCEMENT DIVISION; AND OTHER UNKNOWN AGENTS AND OFFICIALS OF THE SOUTH CAROLINA STATE LAW ENFORCEMENT DIVISION, PETITIONERS,

versus

BRETT ALLEN BURSEY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	2
Statement	3
Summary of Argument	5
Argument	6
I. The presence of the undercover police agent at attorney-client discussions was a consequence of the undercover police agent protecting his identity so that he could continue covert operations in unrelated police matters, did not result in prejudice to the respondent, was justified as advancement of a legitimate state interest, and did not violate the defendant's sixth amendment rights	7
II. A criminal defendant is not constitutionally entitled to be informed by the prosecution that one thought to be a confederate in crime is in reality an undercover police agent and will testify against the defendant at trial	15
III. The circuit court's independent findings of facts and its application of those facts to the doctrine of respondeat superior under § 1983 was erroneous	21
Conclusion	23

CITATIONS

Cases: PAGE

Black v. United States, 385 U. S. 26, 17 L. Ed. (2d) 26, 87 S. Ct. 190 (1966) 7, 13

Brady v. Maryland, 373 U. S. 83, 10 L. Ed. (2d) 202, 83 S. Ct. 201 (1963) 2, 15, 16

Caldwell v. United States, 205 F. (2d) 879 (D. C. Cir. 1953), cert. denied, 349 U. S. 930 (1955) 7, 9

Coplon v. United States, 191 F. (2d) 749 (D. C. Cir. 1951), cert. denied, 342 U. S. 926 (1952) 7, 9

Hoffa v. United States, 385 U. S. 293, 17 L. Ed. (2d) 374, 87 S. Ct. 408 (1966) 19

Lopez v. United States, 373 U. S. 427, 10 L. Ed. (2d) 462, 83 S. Ct. 1381 (1963) 19

Manuel v. Salisbury, 446 F. (2d) 453 (6th Cir. 1971), cert. denied, 405 U. S. 1046 (1972) 15

Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340 (1955) 15

O'Brien v. United States, 386 U. S. 345, 18 L. Ed. (2d) 94, 87 S. Ct. 1158 (1967) 7, 13, 14

Portomene v. United States, 221 F. (2d) 582 (5th Cir. 1955) 20

Ramer v. United States, 411 F. (2d) 30 (9th Cir. 1969), cert. denied, 396 U. S. 965 (1969) 9

Roviaro v. United States, 353 U. S. 53, 1 L. Ed. (2d) 639, 77 S. Ct. 623 (1957) 20

Scher v. United States, 305 U. S. 251, 83 L. Ed. 151, 59 S. Ct. 174 (1938) 20

Sorrentino v. United States, 163 F. (2d) 627 (9th Cir. 1947) 20

United States v. Agurs, No. 75-491, 44 U. S. L. W. 5013 (U. S. June 22, 1976) 17

United States v. Brown, 484 F. (2d) 418 (5th Cir. 1973), cert. denied, 415 U. S. 960 (1974) 15

CITATIONS—Continued

Cases: PAGE

United States v. Choate, 527 F. (2d) 748 (9th Cir. 1975), Appeal Pending, U. S. S. Ct. 10

United States v. Conforti, 200 F. (2d) 365 (7th Cir. 1952) 20

United States v. Cooper, 397 F. Supp. 277 (D. C. Neb. 1975) 9, 10

United States v. Crow Dog, 532 F. (2d) 1182 (8th Cir. 1976) 10

United States v. Dennis, 183 F. (2d) 201 (1950), aff'd, 341 U. S. 494 (1951) 19

United States v. Fanning, 477 F. (2d) 45 (5th Cir. 1973), cert. denied, 414 U. S. 1006 (1973), reh. denied, 414 U. S. 1172 (1973) 10

United States v. McCord, 509 F. (2d) 334 (D. C. Cir. 1975), cert. denied, 421 U. S. 930 (1975) 10

United States v. Mosca, 475 F. (2d) 1052 (2nd Cir. 1972), cert. denied, 412 U. S. 948 (1973) 10

United States v. Rispo, 460 F. (2d) 965 (3rd Cir. 1972) 11

United States v. Rosner, 485 F. (2d) 1213 (2nd Cir. 1973), cert. denied, 417 U. S. 950 (1974) 10

United States v. Zarzour, 432 F. (2d) 1 (5th Cir. 1970) 9

Via v. Cliff, 470 F. (2d) 271 (3rd Cir. 1972) 14

Wilson v. United States, 59 F. (2d) 390 (3rd Cir. 1932) 20

Wolff v. McDonnell, 418 U. S. 539, 41 L. Ed. (2d) 935, 94 S. Ct. 2963 (1974) 11

Zweibon, et al. v. Mitchell, et al., 516 F. (2d) 594 (D. C. Cir. 1975), Appeal Pending, U. S. S. Ct. 9

Statutes:

42 U. S. C. § 1983 ..... 3, 4, 6, 22

Miscellaneous:

VIII Wigmore, Evidence § 2311 (McNaughton rev. 1961) 12

IN THE

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OCTOBER TERM, 1976

No. 75-1510

JACK M. WEATHERFORD, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN AGENT OF THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION, PETE STROM, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHIEF OF THE SOUTH CAROLINA STATE LAW ENFORCEMENT DIVISION; AND OTHER UNKNOWN AGENTS AND OFFICIALS OF THE SOUTH CAROLINA STATE LAW ENFORCEMENT DIVISION, PETITIONERS,

versus

BRETT ALLEN BURSEY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court for the District of South Carolina, Columbia Division (A. 245) is not reported. The opinion of the United States Court of Appeals for the Fourth Circuit (A. 256) is reported at 528 F. (2d) 483 (4th Cir. 1975).

JURISDICTION

The judgment of the United States District Court for the District of South Carolina, Columbia Division, was entered for the Defendants on August 24, 1974. The lower court decision was appealed and on December 2, 1975, the United States Court of Appeals for the Fourth Circuit entered judgment reversing and remanding to the District Court. Defendants-Petitioners Motion for Rehearing and Motion for Rehearing *En Banc* was denied on January 1, 1976. The petition for a writ of certiorari was filed on April 19, 1976, and was granted on June 21, 1976. The jurisdiction of the Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the mere presence of an undercover agent during a defendant's conversation with his counsel constitutes a *per se* violation of the sixth amendment right to effective assistance of counsel.

2. Whether the concealment of an undercover agent's identity until he testifies against a defendant violated that defendant's right to a fair trial and also violated the principles of *Brady v. Maryland,* 373 U. S. 83 (1963).

3. Whether the findings of the district courts as to *respondeat superior* were clearly erroneous.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983.

STATEMENT

This suit arises under 42 U.S.C. § 1983. The basic facts are as follows:

On July 27, 1970, the plaintiff was tried and convicted by a jury of the crime of malicious destruction of property occupied by the Richland County Selective Service Board.

On the night of March 19, 1970, as a part of demonstrations connected with "National Anti-Draft Week" the respondent, the petitioner Weatherford and one or two others went to the office of the Richland County Selective Service Board in Columbia, South Carolina, where a brick was thrown through a window, and red paint was sprayed and splattered on the inside and outside of the building. Attached to the brick was a note attacking the Selective Service System and the war in Vietnam.

Some months prior to March, 1970, petitioner Weatherford was employed by SLED as an undercover agent. At that time he was attending the University of South Carolina and became acquainted with the respondent Bursey through an organization known as "AWARE," which was a group on the University Campus formed to discuss the need for social change and opposition to the war in Vietnam.

On the morning of March 20, 1970, Bursey and Weatherford were arrested after Weatherford had advised SLED agents of the participation by Bursey and Weatherford in the activities at the Selective Service Board Headquarters. Following the arrest, Bursey and Weatherford were taken to the Richland County Jail, where they were booked, charged with the offense and placed in separate cells. At the time of their arrest, they were handcuffed together and Bursey suggested that they keep silent and seek legal counsel.

Shortly after release, Bursey employed C. Rauch Wise of Greenwood to represent him in connection with the

criminal charges. Following his release from prison, petitioner Weatherford continued to act as an undercover agent in the employment of SLED and was engaged in investigating activities and seeking information regarding law violations not only in Columbia but in other South Carolina cities. During this time he remained on the payroll of SLED and made most of his reports to Lt. Ronald Cooper; he rarely had any contacts or dealings directly with petitioner Strom.

On two occasions following the employment of Bursey's attorney, said attorney, Bursey and Weatherford met and the approaching trial was discussed. On neither of these occasions did Weatherford seek information from Bursey or his attorney, and on neither occasion did he initiate or ask for the meeting. He was brought into the meetings by Bursey and Bursey's attorney in an effort to obtain information, ideas or suggestions as to Bursey's defense.

Neither following the various meetings with Bursey and/or Bursey's attorney nor at any other time did Weatherford discuss with or pass on to petitioner Strom, any agents of SLED, or to Solicitor John Foard and/or any of his staff any details or information regarding Bursey's trial plans, strategy or anything having to do with the criminal action pending against Bursey. Until the morning of the 27th of July, 1970, Weatherford did not know he would be used as a witness in the criminal action and Solicitor Foard had not decided, until just prior to the call of the case, that he would use Weatherford as a witness. Weatherford testified at the trial of Bursey and the jury found Bursey guilty.

Thereafter on July 2, 1973, respondent Bursey, under 42 U.S.C. 1983, filed a complaint against the petitioner alleging violations of Bursey's rights under the Fourth,

Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The District Court for the District of South Carolina on August 20, 1974, entered judgment for the petitioner because there were no facts to support the respondent's allegations that his constitutional rights were, in fact, violated by the mere presence of Weatherford. The Court of Appeals for the Fourth Circuit reversed the judgment of the District Court holding *inter alia* that any intrusion by Weatherford into Bursey's attorney-client relationship constituted a *per se* violation of Bursey's constitutional rights.

SUMMARY OF ARGUMENT

1. Although it is admitted that the police undercover agent Weatherford was present on two occasions with the respondent and his attorney when matters involving respondent's trial were discussed, the agent's presence was essential for maintenance of his cover. His continued activity as an undercover agent in other matters, was needed by police, and the state had a legitimate interest in protecting his identity.

The agent Weatherford did not seek nor initiate either of the meetings with the respondent and his attorney, but, instead, participated in those discussions so that he would not arouse suspicion about his real identity. At no time did he communicate to police or prosecuting authorities information obtained from such discussions.

In the circumstances, the agent Weatherford's presence at attorney-client discussions did not deny to respondent the Sixth Amendment right to counsel. By inviting and permitting Weatherford to be present at attorney-client discussions, since the attorney did not represent Weatherford, respondent and his attorney waived the confidentiality of such discussions.

2. A criminal defendant is not constitutionally entitled to be informed by the prosecution that one thought to be a confederate in crime is in reality an undercover police agent and will testify against the defendant at trial.

The circuit court's ruling establishes an unprecedented constitutional right to a pre-trial at which the prosecution is required to disclose its case.

3. Absent evidence that petitioner Strom either had direct knowledge of or was directly involved in the alleged denial of respondent's constitutional rights, the doctrine of *respondeat superior* bars any claim for damage under 42 U.S.C. § 1983 against the petitioner Strom.

ARGUMENT

The issues involved are (1) whether the presence of a police undercover agent in attorney-client discussions of the pending trial of a criminal defendant *per se* is a violation of the defendant's constitutionally guaranteed right to effective assistance of counsel, (2) whether failure of the prosecution to disclose to the defendant the identity of the police undercover agent prior to trial, and calling the agent to testify against the defendant at trial, constitute a denial to the defendant of a fair trial, and (3) whether the findings of the district court as to *respondeat superior* were clearly erroneous.

It is argued for the State (prosecution) that the continued anonymity of the undercover agent was to serve the legitimate State interest of having the benefit of his services in other police matters unrelated to the respondent or his prosecution. This, coupled with the fact that the agent never sought to be included in attorney-client conferences and never communicated information gleaned from such discussions to the prosecution, is sufficient to distinguish the situation from a *Coplon-Caldwell* intrusion.[1] As to petitioner Strom, the further argument is made that his actions were not such as to satisfy the "personal involvement" requirement to hold him in any way responsible for the actions of petitioner Weatherford.

1. **The presence of the undercover police agent at attorney-client discussions was a consequence of the Undercover police agent protecting his identity so that he could continue covert operations in unrelated police matters, did not result in prejudice to the respondnt, was justified as advancement of a legitimate State interest, and did not violate the defendant's sixth amendment rights.**

The Circuit made the following conclusions with respect to the effective assistance of counsel:

> "We conclude that whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial." (A. 260.)
>
> "We think *Black v. United States,* 385 U. S. 26 (1966), and *O'Brien v. United States,* 386 U. S. 345 (1967), read together, establish such a *per se* rule." (A. 260.)
>
> "We . . . conclude that on the facts as found by the district court Bursey's rights to effective counsel . . . were violated." (A. 259.)

The findings of fact of the district court of importance to the effective assistance of counsel issue are as follows:

> "9. On two occasions following the employment of plaintiff's attorney, said attorney, the plaintiff and the defendant Weatherford met and the approaching trial was discussed. On neither of these occasions did the defendant Weatherford seek information from the plaintiff or his attorney, and on neither occasion did he initiate or ask for the meeting. He was brought into

[1] *Caldwell v. United States,* 205 F. (2d) 879 (D. C. Cir. 1953), *cert. den.,* 349 U. S. 930 (1955); *Coplon v. United States,* 191 F. (2d) 749 (D. C. Cir. 1951), *cert. den.,* 342 U. S. 926 (1952).

the meetings by the plaintiff and plaintiff's attorney in an effort to obtain information, ideas or suggestions as to the plaintiff's defense. . . ."

"10. The defendant Weatherford did not reveal himself as an informer at the two meetings with the plaintiff and the plaintiff's attorney. He also met the plaintiff's attorney on several occasions at the social events, usually connected with the Chapter of the American Civil Liberties Union in Columbia, South Carolina. On these social contacts he was not asked if he was an agent. In most meetings with the plaintiff's attorney the defendant Weatherford was questioned about how his attorney, Frank Taylor, Sr., was handling his defense. This was a natural reaction of a younger attorney trying to learn from an older more experienced attorney."

"11. That following the various meetings with the plaintiff and/or plaintiff's attorney nor at any other time did the defendant Weatherford discuss with or pass on to defendant Strom, any agents of SLED, or to Solicitor John Foard and/or any of his staff any details or information regarding the plaintiff's trial plans, strategy or anything having to do with the criminal action pending against plaintiff. Until the morning of the 27th of July, 1970, Weatherford did not know he would be used as a witness in the criminal action and Solicitor Foard had not decided, until just prior to the call of the case, that he would use Weatherford as a witness. . . ."

"16. The defendant Weatherford did not in any way interfere with the plaintiff's right to assistance of counsel or right to a fair trial nor did he obtain any information from plaintiff or his attorney amounting to an illegal search and seizure. No information following the arrest of plaintiff or following his employment of counsel was relayed by Weatherford to any agent of SLED or person connected with the prosecution of the case."

In summary the Circuit Court found that because the informer Weatherford was invited by Bursey and his attorney into conversation about the preparation of the trial with Bursey and his attorney that Bursey's Sixth Amendment rights were violated.[2]

This Court and other circuit courts have attempted to establish the basic test to apply in viewing a factual situation and whether or not a defendant's Sixth Amendment rights have been violated. The test most often seen is that surreptitious intrusion may deny those subjects effective assistance of counsel in derogation of their sixth amendment rights. *See, e. g. United States v. Zarzour,* 432 F. (2d) 1 (5th Cir. 1970); *Coplon v. United States,* 191 F. (2d) 749 (D. C. 1951); *Caldwell v. United States,* 205 F. (2d) 879 (D. C. Cir. 1953); *Zweibon, et al. v. Mitchell, et al.,* 516 F. (2d) 594 (D. C. Cir 1975); *United States v Cooper,* 397 F. Supp. 277 (D. C. Nebr. 1975).

In *Hoffa v. United States,* 385 293, 306 (1966), this Court carefully noted that in assuming that *Caldwell, supra,* and *Coplon, supra,* were properly decided that both "dealt with government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel."

Other courts have found different tests to apply. In *Ramer v. United States,* 411 F. (2d) 30, 37 (9th Cir. 1969), the court recognized the test to be "surreptitious interception." The Court in *United States v. Zarzour,* 432 F. (2d) 1, 4 (5th Cir. 1970) interpreted *Hoffa, Black, Coplon* and *Caldwell* to require a showing that the government's evidence was "tainted" in order to vitiate the conviction. A violation of the sixth amendment can occur when the in-

[2] The Circuit Court placed no significance upon the fact that any information received by Weatherford due to the conversation with Bursey and his attorney was never passed to SLED or Solicitor Foard nor upon the fact that none of the information received by Weatherford was used in the criminal trial of Bursey.

vasion is sufficiently pervasive and pernicious. *United States v. Mosca,* 475 F. (2d) 1052, 1060 (2nd Cir. 1972). The second circuit in *United States v. Rosner,* 485 F. (2d) 1213, 1224 (2nd Cir. 1973) concluded that a finding of unlawful intrusion must precede the determination of its consequences. In *United States v. Fanning,* 477 F. (2d) 45, 48 (5th Cir. 1973) that court found that there must be an intrusion through an informant and that a showing of prejudice therefrom be made. In *United States v. McCord,* 509 F. (2d) 334, 353 (D. C. Cir. 1975) that court looked to see if the confidences disclosed were given to the United States Attorney's Office. The court in *United States v. Choate,* 527 F. (2d) 748, 751 (9th Cir. 1975) seems to hold that gross surreptitious government invasions into the legal camp may violate defendant's Sixth Amendment right to counsel and that absent a showing of gross surreptitious governmental invasion there must be a showing of prejudice.

In the recent case *United States v. Crow Dog,* 532 F. (2d) 1182, 1198 (8th Cir. 1976) that court said that in the absence of a showing of prejudice there must be the actual gaining of information relative to a charge against a defendant and the information must be obtained by an intrusion into the attorney-client relationship. *Crow Dog* cited *United States v. Cooper,* 397 F. Supp. 277 (D. Neb. 1975) for this proposition. In *Cooper* at 285 that court adopted the following: "If a government informant (1) gains information (2) relating to a charge then pending or being investigated (3) from overhearing conversations, by counsel expected to be confidential, and (4) the information is divulged before or during trial on that charge to counsel handling the prosecution of that charge, then there has been a violation of the defendant's Sixth Amendment right. . . ."

The above is pointed for three purposes, one to show that courts do not adopt a *per se* rule and secondly to show

that no matter the test applied there is no sixth amendment violation in this case. And thirdly to show the confusion that exists in determining when a six amendment violation occurs. As pointed out above the facts in this case show that a defendant and his attorney **invited** the undercover agent into conversations with the defendant and his attorney on two occasions.[3] The many cases cited all require an intrusion; here there was none; Weatherford was invited into all conversations. Some cases require a showing of prejudice; there has been no such showing. Other cases require gross surreptitious invasions; in this case the undercover agent did nothing that would amount even to an invasion. No matter the test no case found elevates the facts of this case into a sixth amendment violation.[4]

The reach of the sixth amendment is only to protect the attorney-client relationship from intrusion in the criminal setting. *Wolff v. McDonnell,* 418 U. S. 539, 576 (1974). If there has been no intrusion there is no violation.

The facts of this case do not show a plan to invade the attorney-client relationship; do not show an effort made to intrude upon the attorney-client relationship; nor do the facts show any action by an undercover agent to thrust himself into the attorney-client relationship. The facts instead show that Weatherford was solicited for each meeting. The first meeting took place at Mr. Bursey's house; this meeting was arranged and initiated solely by Mr. Bursey and his attorney (A. 35). For the second meeting, Mr. Bursey and his attorney went to Weatherford's girlfriend's house and waited for Weatherford (A. 39). Weatherford was compelled to participate in these meetings in order to maintain his cover.

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[3] The record shows that the undercover agent Weatherford did not initiate the meetings nor did he know of the purpose of the meetings nor of the meetings themselves until the defendant Bursey and his attorney were actually in Weatherford's presence.

[4] *But, cf. United States v. Rispo,* 460 F. (2d) 965 (3rd Cir. 1972). *Rispo,* unlike the instant case, the factual tableau was "shocking."

It was felt by state police officials that it was important to the state for the agent Weatherford to maintain secrecy and continue his undercover operations with respect to matters having no connection with the Bursey incident. SLED Officer Cook stated that the agent's involvement with Bursey was only "incidental" to his general assignment, and that he was of great value as an agent in other matters until the time his identity was revealed at Bursey's state court trial. (A. 144-45.) In addition, it was felt that the agent's life might be in danger if his identity was known. (A. 132.) Thus, the state had a legitimate interest in maintaining the secrecy of the agent's identity during the pre-trial entirely separate from its prosecution of the respondent for his part in the Draft Board incident.

The confusion created by the many lower court decisions can be clarified by examining the basic concept of the attorney-client privilege and *Coplon* and *Caldwell.* The basic question thus becomes, was there a valid, confidential attorney-client relationship? Petitioners think that it is elementary that any privileged or confidential relationship was waived when respondent Bursey and his attorney purposely invited petitioner Weatherford to be present at the two meetings. At this point there was no confidential attorney-client relationship to be violated. The presence of a third party not within the umbrella of the privilege destroys any privilege or right to confidentiality of the attorney-client relationship. *See,* VIII Wigmore, *Evidence* § 2311 (McNaughton rev. 1961).

> "One of the circumstances by which it is commonly apparent that the communication is not confidential is the *presence of a third party* who is not the agent of either client or attorney." *Id.* at § 2311.

In *Caldwell* and *Coplon* the boundaries adopted in *Hoffa* are delineated. In *Caldwell* the agent had a dual capacity as defense assistant and agent; he was within the umbrella of the attorney-client privilege. In *Coplon* the agents intercepted telephone calls between an attorney and his client; the attorney-client privilege had thus not been waived and the intrusion in this situation is apparent.

The Court in *Hoffa* recognized that the prosecution's agent must invade the privilege by either intercepting information without knowledge of the attorney and client or by coming within the umbrella of the privilege and subsequently giving information to the prosecution.

In the instant case the holding of the Circuit Court cannot find support in the established case law and reversal is required.

In holding that the mere presence of an undercover agent during a defendant's conversation with his counsel is a *per se* violation of that defendant's sixth amendment right to effective assistance of counsel, the circuit court has incorrectly interpreted *Black v. United States,* 385 U. S. 26 (1966) and *O'Brien v. United States,* 386 U. S. 345 (1967), thereby severely handicapping state officials in their administration of effective law enforcement.

The *Black-O'Brien* rule is construed by the circuit court to hold that whenever there is any kind of intrusion into the attorney-client relationship requiring reversal of a criminal conviction and a new trial, the sixth amendment right to effective assistance of counsel has been abridged. It is respectfully suggested that neither *Black* nor *O'Brien* establish such a *per se* rule.

In *Black,* it was admitted that FBI agents had installed a listening device in Black's hotel suite, and that attorney-client discussions were heard and recorded. At the time of trial, neither the judge nor Black's attorneys knew of the intrusion, and Government attorneys did not realize until two years later that such discussions had been

overheard and recorded. This Court did nothing more in *Black* than remand the case to the district court for a new trial. In the words of the Court, the remand was for the purpose of reviewing the facts surrounding the "bugging".

> "This will give the parties an opportunity to present the relevant evidence and permit the trial judge to decide the questions involved. It will also permit the removal of any doubt as to Black's receiving a fair trial with full consideration being given to the new evidence reported to us by the Solicitor General." *Black*, 385 U. S. 26, 29.

In *O'Brien v. United States, supra,* the Court again remanded for a new trial a case in which it was discovered after trial that a listening device placed by FBI agents had recorded attorney-client conversations.

The circuit court here concluded, apparently relying on *Black* and *O'Brien, supra,* that because the fact of intrusion, unknown by the court and the parties at the time of criminal trial, required new trial, such intrusion was in all cases a *per se* denial of effective assistance of counsel. (A. 260.) This conclusion does not reasonably follow. If the fact of intrusion alone constitutes a denial of the sixth amendment right to counsel, a new trial could never cure the defect. The circuit court says (A. 261):

> "In the context of a civil suit, our holding that Bursey's sixth amendment right to counsel was violated sustains his suit irrespective of any showing of substantial prejudice to his defense. *Via v. Cliff,* 470 F. (2d) 271, 275."

It is submitted that *Black* and *O'Brien, supra,* are not authority for a rule that intrusion alone constitutes a denial of the right to counsel, but that, instead, they hold nothing more than that the fact of intrusion requires full examination into the question of whether or not there has

been such denial.[5] The district court held such an examination and found that there was no denial of Bursey's right to counsel. Until a denial has been established, a civil suit cannot be sustained.

2. **A criminal defendant is not constitutionally entitled to be informed by the prosecution that one thought to be a confederate in crime is in reality an undercover police agent and will testify against the defendant at trial.**

The circuit court held that concealing the identity of the undercover agent during trial preparation, then permitting him to testify against the defendant at trial, violates the Due Process Clause of the fourteenth amendment.

> "We also hold that Bursey's rights to a fair trial were violated by the government's countenancing of Weatherford's role in this case. *Brady v. Maryland,* 373 U. S. 83 (1963). . . . Here appellees insist that state officers may conceal the identity of an informant from a defendant during the trial preparation, that the informant can deny up through the day before his appearance at trial that he will testify against the defendant, and that he can then testify with devastating effect—all without impairing a fair trial. We think not." (A. 261-262.)

This holding contravenes the decisions of this Court that delineate the parameters within which a prosecutor must operate to ensure that a criminal defendant receives a fair trial.

This Court has consistently held that a prosecutor may violate a defendant's constitutional right to a fair trial in two circumstances: (1) the presentation of testimony known to be perjured, *e. g., Mooney v. Holohan,* 294 U. S. 103 (1935), and (2) the suppression of evidence favorable to an accused upon request where the evidence is material

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[5] *United States v. Brown,* 484 F. (2d) 418 (5th Cir. 1973); *Cf. Manuel v. Salisbury,* 446 F. (2d) 453 (6th Cir. 1971).

either to guilt or to punishment, *e. g., Brady v. Maryland,* 373 U. S. 83 (1963). The instant case involves neither of these circumstances, and therefore requires this Court to decide whether the constitutional mandate of a fair trial requires a prosecutor to reveal the evidence he possesses which would incriminate the accused.

The facts in this case demonstrate that Bursey received a fair trial. In fact, the gravamen of Bursey's claim of a denial of his right to a fair trial is that he was unfairly surprised that the prosecution could prove its case.[6] Bursey admitted his guilt at his criminal trial,[7] and during the trial of the instant case (A. at 26-30). This admitted guilt flies in the face of his claim that he was denied a fair trial. The very essence of *Mooney* and *Brady* is this Court's concern that the trial of an accused may be tainted because the jury is presented either an erroneous or an incomplete picture. It is undisputed, however, that Bursey's jury was presented an accurate and complete picture of his criminal activity. It is the accuracy and the thoroughness of the prosecution's case which Bursey would have this Court characterize as a denial of his right to a fair trial. The petitioner has found no authority to support this position.

Finding no support in the transcript of the respondent's trial for the proposition that tained evidence was introduced or withheld, the circuit court held that Bursey

[6] During the sentencing of the respondent, his attorney, C. Rauch Wise, Esquire, stated to the General Sessions Court:

> "What I mean by that Your Honor, is that we were prepared to go to trial for the simple reason that we didn't believe the State could prove its case as required by law, and when they put Mr. Weatherford on the stand, it was pretty obvious that we had a 'different row to hoe', but we made a decision at that time to continue with the trial and see what would ensue. . . ." Record of trial in District Court, Plaintiff's Exhibit 4 at 147.

[7] *See* record of trial in District Court, Plaintiff's Exhibit 4 (Transcript of General Sessions Court Trial, July 27, 1970) at 112-119.

was denied a fair trial because he was denied the opportunity:

> "(1) to consider whether plea bargaining might be the best course, (2) to do a background check on Weatherford for purposes of cross examination, and (3) to attempt to counter the devastating impact of eyewitness identification." (A. 262.)

In essence the circuit court would require the prosecution to disclose its case prior to trial; a constitutionally mandated pretrial disclosure. No decision of this Court goes that far. *Brady* only requires the disclosure of evidence favorable to the accused.

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

None of the reasons advanced by the circuit court support the contention that Bursey was denied a fair trial. A prosecutor is under no obligation to ensure that a criminal defendant has sufficient information so that he may intelligently plea bargain. If the defense must be afforded information about the prosecution's case beforehand so that an appraisal can be made relative to the desirability of plea bargaining, nothing less than all the evidence will suffice. It is not reasonable to argue that plea bargaining can be fully explored with knowledge of only part of the evidence. There is virtually no aspect of the prosecution's case that would not be relevant and material to the issue of plea bargaining, and therefore the circuit court's opinion is an unprecedented effort to force the prosecution to disclose its entire case to an accused. This Court has recently rejected such a proposition. *United States v. Agurs,* No. 75-491, 44 U. S. L. W. 5013, 5017 (U. S. June 22, 1976).

A prosecutor is under no obligation to reveal the identity of an agent far enough in advance of trial to permit the accused the opportunity to conduct a full investigation into the agent's background for the purposes of cross-examination. In the instant case a background investigation would have revealed a prior drug conviction of Weatherford (A. 89-90). This Court, however, has recently held that a prior criminal record is not material to a fair trial, and therefore the prosecution is not obligated to disclose a prior criminal record unless it could create a reasonable doubt. *Agurs, supra,* at 5017. Bursey, however, admitted his guilt at the trial, and it is undisputed that Weatherford truthfully testified about Bursey's criminal activity. Therefore under *Agurs,* the prior criminal record of Weatherford is not material to Bursey's right to a fair trial. In fact, the revelation of Weatherford's past criminal activity in this case would only serve to taint testimony that is admittedly accurate.

The circuit court's final justification for its holding, the constitutional right of a criminal defendant to have an opportunity to counter the devastating impact of eyewitness identification, is likewise without support. This proposition would require all prosecutor's to reveal the names of all eyewitnesses to criminal activity prior to trial. The petitioner has found no decision reaching so far. Moreover, the standard of "devastating impact" is so broad as to virtually require the disclosure of the entire case for the prosecution. Who can determine that some evidence will be devastating, and, therefore, subject to be revealed to the accused, and that other evidence is not devastating and may be kept from him?

Respecting the use of informants, this Court said in *Hoffa v. United States,* 385 U. S. 293, 311 (1966), quoting Judge Learned Hand:

> Courts have countenanced the use of informers from time immemorial; . . . *United States v. Dennis,* 183 F. (2d) 201 at 224.

In *Lopez v. United States,* 373 U. S. 427, 440 (1963), this Court stated:

> The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a federal court.

The present case is hardly distinguishable from the facts in *Hoffa.* There, Hoffa took into his confidence an informer, Partin, who under the Court's premise, was a government informant from the beginning, and was used as a prosecution witness at the criminal trial of Hoffa for attempted bribery of jury members. Answering a fourth amendment attack, this Court said:

> Partin was in the suite by invitation, and every conversation which he heard was either directed toward him or knowingly carried on in his presence . . . Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. *Id.* at 302.

The foregoing language applies equally to a fourteenth amendment attack charging denial of a fair trial. Weatherford's participation with Bursey in the Draft Board inci-

dent, and all conversations between the conspirators prior to the criminal act, resulted in Bursey's misplaced confidence that the agent Weatherford was a valid co-conspirator. Weatherford did not enter into the relationship by means of force or stealth.

> "In the words of the dissenting opinion in *Lopez,* 'the risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." *Hoffa, supra* at 303.

It is also the risk we necessarily assume whenever we enter into criminal activity with another person.

Several decisions seem to require the prosecution to disclose an informer's identity when the informer actually participated in the criminal activity. *See e. g., Roviaro v. United States,* 353 U. S. 53 (1957); *Scher v. United States,* 305 U. S. 251 (1938); *Portomene v. United States,* 221 F. (2d) 582 (5th Cir. 1955); *United States v. Conforti,* 200 F. (2d) 365 (7th Cir. 1952); *Sorrentino v. United States,* 163 F. (2d) 627 (9th Cir. 1947); *Wilson v. United States,* 59 F. (2d) 390 (3rd Cir. 1932). In each of these decisions, however, the defendant was denied a fair trial because the informer was never used by the prosecution as a witness. In each case the defendant was denied access to a material witness, the best witness to the alleged criminal activity. The constitutional right to a fair trial was violated in these cases because the prosecution suppressed material evidence and the jury was deprived of key testimony. That is simply not the situation in this case; there was no suppression of material evidence. The prosecution used the agent as a witness thereby presenting the jury with an accurate and complete picture of Bursey's criminal activity.

In conclusion, the petitioners would be remiss if they did not point out that the circuit court opinion substantially hampers the administration of effective law enforcement. If the prosecution is constitutionally required to reveal the identity of all informants and undercover agents upon the request of the accused, it is respectfully submitted that a decrease in the number of informers and undercover agents necessarily follows. Likewise, if a prosecutor must disclose the identity of law enforcement undercover agents upon the request of the accused, an agent's utility becomes limited to one conviction and his life perhaps endangered by the dissolution of his cover. It is respectfully submitted that an accused's right to a fair trial is more than adequately protected by the existing restraints upon law enforcement officials:

(1) perjured testimony is prohibited,
(2) material, exculpatory evidence cannot be suppressed,
(3) informers who participate in the criminal activity must testify.

An extension of the accused's constitutional right to a fair trial to embrace the facts of this case will further weaken effective law enforcement.

3. **The circuit Court's independent finding of facts and its application of those facts to the doctrine of respondeat superior under § 1983 was erroneous.**

The district court found that "there is no testimony connecting defendant Strom with any of such acts allegedly committed by Weatherford." (A. 255) The Circuit Court held that this finding of fact by the district court was "clearly erroneous," and that "Strom's own decisions directly caused the violation of Bursey's constitutional rights." (A. 262) The decisions of Strom to which the Circuit Court refers are: (1) the decision to maintain

Weatherford's cover; (2) the decision to allow Solicitor Foard to work out the details of maintaining Weatherford's cover; and (3) the decision to allow Weatherford to testify. (A. 262)

It is respectfully submitted that the district court was correct in its finding that Strom had no connection with the actions of Weatherford. To prove that Strom participated in the deprivation of Bursey's constitutional rights, it is essential that Strom had knowledge of Weatherford's meetings with Bursey and Bursey's attorney.

The Circuit Court, finding no direct knowledge on the part of Strom, relies on three of his "decisions" that are unrelated to the plaintiff's alleged constitutional deprivations. Strom's decisions to maintain Weatherford's cover and to entrust this matter to Solicitor Foard are not, by any stretch of the imagination, tantamount to requesting Weatherford to intrude upon the attorney-client relationship. Likewise, Strom's approval of the use of Weatherford as a witness concerned the dissolution of Weatherford's cover, and not the approval of Weatherford's intrusion, if any.

It is respectfully submitted that the Circuit Court finding of fact that Strom caused the violations of Bursey's constitutional rights is clearly erroneous and shocking, requiring reversal.

The Circuit Court concluded that liability through the doctrine of *respondeat superior*[8] does not apply to this case because that doctrine only applies to an "innocent master being held vicariously liable for the acts of his servant." Absent a finding of fact that defendant Strom either directed or knew of agent Weatherford's activities

[8] The Circuit Court and the District Court both recognize that the doctrine of *respondeat superior* does not apply to 42 U. S. C. 1983 actions.

with Bursey and Bursey's attorney, Strom is an innocent master; the District Court correctly so held.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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August, 1976.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Supreme Court, U. S.
FILED
OCT 20 1976
MICHAEL RODAK, JR., CLERK

No. 75-1510

JACK M. WEATHERFORD, Individually and in his official capacity as an agent of the South Carolina Law Enforcement Division; PETE STROM, individually and in his official capacity as Chief of the South Carolina State Law Enforcement Division; and other unknown agents and officials of the South Carolina State Law Enforcement Division,

Petitioners,

v.

BRETT ALLEN BURSEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
QUESTIONS PRESENTED	1
STATEMENT	2
SUMMARY OF ARGUMENT	25
ARGUMENT	30
CONCLUSION	80

TABLE OF AUTHORITIES

Cases:

Alcorta v. Texas, 355 U.S. 28 (1957) 29,68,69

Anders v. California, 386 U.S. 738 (1967) 36

Argersinger v. Hamlin, 407 U.S. 25 (1972) 32,74,75

Avery v. Alabama, 308 U.S. 444 (1940) 32

Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964) 48

Berger v. United States, 295 U.S. 78 (1935) 68

Black v. United States, 385 U.S. 26 (1966) ..... *passim*

Blackledge v. Perry, 417 U.S. 21 (1974) 29,70

Boone v. Padenick, ____ F.2d ____ (4th Cir. 1976) No. 76-1090 48

Brady v. Maryland, 373 U.S. 93 (1963) 29,47,59,68,69

Brooks v. Tennessee, 406 U.S. 605 (1972) 32,35,36

Brzozowski v. Randall, 281 F.Supp. 306 (E.D. Pa. 1968) 54

Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953) ..... *passim*

Coleman v. Alabama, 399 U.S. 1 (1970) 32,60

Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964) 28,65

Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1952) ..... *passim*

	Page
Douglas v. California, 372 U.S. 353 (1963)	36
Duncan v. Louisiana, 391 U.S. 145 (1968)	75
Emmett v. Ricketts, 397 F.Supp. 1025 (N.D. Ga. 1975)	48
Escobedo v. Illinois, 378 U.S. 487 (1964)	26,32,33,37,38
Estes v. Texas, 381 U.S. 532 (1965)	27,52,74
Evans v. Kropp, 254 F.Supp. 218 (E.D. Mich. 1966)	48
Faretta v. California, 422 U.S. 806 (1975)	36
Ferguson v. Georgia, 365 U.S. 570 (1961)	32,36
Fisher v. United States, ____ U.S. ____, 96 S.Ct. 1569 (1976)	25,34,35
Fisher v. Volz, 496 F.2d 333 (3rd Cir. 1974)	79
Geders v. United States, ____ U.S. ____ (1976) 44 LW 4420	36
Gideon v. Wainwright, 372 U.S. 335 (1963)	25,32,74
Giglio v. United States, 405 U.S. 150 (1972)	47,68
Giles v. Maryland, 386 U.S. 66 (1967)	68
Glasser v. United States, 315 U.S. 60 (1942)	27,32,43,50,53,74
Granello v. United States, 386 U.S. 1019 (1967)	41
Griffin v. Illinois, 351 U.S. 12 (1956)	75
Griswold v. Connecticut, 381 U.S. 479 (1965)	75
In re Groban, 352 U.S. 330 (1957)	33
Hamilton v. Alabama, 368 U.S. 52 (1961)	27,50,74
Herring v. New York, 422 U.S. 853 (1975), 95 S.Ct. 2550	*passim*
Hickman v. Taylor, 329 U.S. 495 (1947)	34
Hoffa v. United States, 385 U.S. 293 (1966)	*passim*
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	70
Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965)	28,65

	Page
Irvin v. Dowd, 366 U.S. 717 (1961)	52
Jencks v. United States, 353 U.S. 667 (1957)	76
McArthur v. Pennington, 253 F.Supp. 420 (E.D. Tenn. 1963)	54
Manuel v. Salisbury, 446 F.2d 453 (6th Cir. 1971)	56
Marshall v. United States, 360 U.S. 310 (1959)	52
Massiah v. United States, 377 U.S. 201 (1964)	25,33
Miller v. Pate, 386 U.S. 1 (1967)	68
Miranda v. Arizona, 384 U.S. 436 (1966)	32
Monroe v. Pape, 365 U.S. 167 (1961)	30,79
Mooney v. Holohan, 294 U.S. 103 (1935)	68
Moore v. Illinois, 408 U.S. 786 (1972)	48
In re Murchison, 349 U.S. 133 (1955)	51
Nash v. Purdy, 283 F.Supp. 837 (S.D. Fla. 1968)	48
Naupe v. Illinois, 360 U.S. 264 (1959)	68
Neil v. Biggers, 409 U.S. 188 (1972)	78
North Carolina v. Pearce, 395 U.S. 711 (1969)	70
O'Brien v. United States, 386 U.S. 345 (1967)	*passim*
Olmstead v. United States, 277 U.S. 438 (1928)	38
Peters v. Kiff, 407 U.S. 493 (1972)	27,51
Portomene v. United States, 221 F.2d 582 (5th Cir. 1955)	76
Powell, v. Alabama, 287 U.S. 45 (1932)	32,33,37
Pyle v. Kansas, 317 U.S. 213 (1942)	68
Radiant Burners, Inc. v. American Gas Assoc., 320 F.2d 314 (7th Cir. 1963) *cert. den.*, 374 U.S. 929 (1963)	63
Reynolds v. Cochran, 365 U.S. 525 (1961)	32
Rideau v. Louisiana, 373 U.S. 723 (1963)	52
Roviaro v. United States, 353 U.S. 53 (1957)	29,30,66,69,73

	Page
Sacher v. United States, 343 U.S. 1 (1952)	37
Schipani v. United States, 385 U.S. 372 (1966)	39,40
Shapiro v. Thompson, 394 U.S. 618 (1969)	75
Sheppard v. Maxwell, 384 U.S. 333 (1966)	52
Sorrentino v. United States, 163 F.2d 627 (9th Cir. 1947)	76
State v. Gellis, 158 S.C. 471, 155 S.E. 849 (1930)	35
State of South Dakota v. Long, 465 F.2d 65 (8th Cir. 1972)	56
Ex parte Sullivan, 107 F.Supp. 514 (D. Utah 1952)	33
Taglianetti v. United States, 398 F.2d 558 (1st Cir. 1968) *aff'd* 394 U.S. 316 (1969)	36,54
Tumey v. Ohio, 273 U.S. 510 (1927)	27,51
Turner v. Louisiana, 379 U.S. 466 (1965)	51
United States v. Agurs, ____ U.S. ____, 96 S.Ct. 2392 (1976)	68
United States v. Aldivisio, 424 F.2d 20 (10th Cir. 1970)	56
United States v. Banks, 383 F.Supp. 389 (D. S.Dak. 1974)	48
United States v. Brown, 484 F.2d 418 (5th Cir. 1973)	55
United States v. Brown, 317 F.Supp. 531 (E.D. La. 1970)	56
United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971)	48
United States v. Choate, 527 F.2d 748 (9th Cir. 1975)	56
United States v. Conforti, 200 F.2d 365 (7th Cir. 1952)	76
United States v. Cooper, 397 F.Supp. 277 (D. Neb. 1975)	56

	Page
United States v. Crow Dog, 532 F.2d 1182 (8th Cir. 1976)	55
United States ex rel. Cooper v. Denno, 221 F.2d 626 (2d Cir.) *cert. den.*, 349 U.S. 968 (1955)	50,53
United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973)	48
United States v. Eley, 335 F.Supp. 353 (N.D. Ga. 1972)	48
United States v. Fanning, 477 F.2d 45 (5th Cir. 1973)	56
United States v. Huss, 482 F.2d 38 (2nd Cir. 1973)	75
United States v. Lebron, 222 F.2d 531 (2nd Cir. 1955)	53
United States v. McCord, 509 F.2d 334 (D.C. Cir. 1974) *cert. den.*, 95 S.Ct. 1656 (1975)	55
United States v. Mosca, 475 F.2d 1042 (2nd Cir. 1973), *cert. den.*, 412 U.S. 948 (1973)	56,57
United States v. Nixon, 418 U.S. 683 (1974)	70,73,75
United States v. Nobles, 422 U.S. 225 (1975)	34,37
United States v. Reynolds, 345 U.S. 1 (1953)	76
United States v. Rispo, 460 F.2d 965 (3rd Cir. 1972)	53
United States v. Rosner, 485 F.2d 1213 (2nd Cir. 1973)	56
United States v. Scott, 521 F.2d 1188 (9th Cir. 1975)	55
United States v. Wade, 388 U.S. 218 (1967)	32,60,69
United States v. Zarzour, 432 F.2d 1 (5th Cir. 1970)	56
Via v. Cliff, 470 F.2d 271 (3rd Cir. 1972)	54
White v. Maryland, 373 U.S. 59 (1963)	50
White v. Ragen, 324 U.S. 760 (1945)	68
Wilde v. Wyoming, 362 U.S. 607 (1960)	68

	Page
Williams v. Florida, 399 U.S. 78 (1970)	29,67
Wood v. Strickland, 420 U.S. 308 (1975)	30,79
Constitution of the United States:	
Fourth Amendment	2
Fifth Amendment	*passim*
Sixth Amendment	*passim*
Fourteenth Amendment	2,32
Statutes and Rules:	
18 U.S.C. §1503	41
42 U.S.C. §1983	2,54,79
Federal Rules of Civil Procedure, Rule 8(c)	70
Other Authorities:	
American Bar Association, Code of Professional Responsibility	37
"Attorney-Client Privilege," 8 Col. J.L. & Soc. Prob. 179 (1972)	65
Brennan, "The Criminal Prosecution: Sporting Event or Quest for the Truth?", 1963 Wash. L.Q. 279	66-67
Final Report of the Select Committee To Study Governmental Operations With Respect to Intelligence Activities, April 26, 1976	38,76
Kaufman, "Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts," 47 Colum. L. Rev. 1113 (1957)	67
Nakell, "Discovery For the Defense & Prosecution," 50 N.C.L.Rev. 437 (1972)	66
Wigmore, Evidence (McNaughton Rev. 1961)	63,64

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1510

JACK M. WEATHERFORD, Individually and in his official capacity as an agent of the South Carolina Law Enforcement Division; PETE STROM, individually and in his official capacity as Chief of the South Carolina State Law Enforcement Division; and other unknown agents and officials of the South Carolina State Law Enforcement Division,

Petitioners,

v.

BRETT ALLEN BURSEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether respondent was denied effective assistance of counsel and a fair state court trial where a paid informer posing as a co-defendant infiltrated the defense camp, affirmatively misled respondent and his counsel as to his true identity and the nature of

the state's case, participated in attorney-client discussions and discovered the entire defense strategy, collaborated with the prosecution, subsequently testified against the respondent at the state trial, and where respondent was demonstrably prejudiced by the deceptive practices?

II. Whether the chief of the South Carolina State Law Enforcement Division is liable for violations of respondent's right to counsel and fair trial where his own decisions directly caused the deprivations?

STATEMENT

Respondent, Brett Allen Bursey, brought this action for damages under 42 U.S.C. §1983 against petitioners Pete Strom, Chief of the South Carolina Law Enforcement Division (hereinafter "SLED"), and Jack M. Weatherford, a paid informer for SLED. Bursey contended that Weatherford penetrated his defense camp when he was being prosecuted in state court for malicious destruction to real and personal property and deprived him of the effective assistance of counsel, a fair trial, privacy and freedom from unlawful governmental intrusion in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States. A. 3-6. Petitioners moved for summary judgment which was denied. A. 9-20. The case was subsequently heard on the merits by the court sitting without a jury. The district court dismissed the complaint on August 20, 1974, A. 245-55, and an appeal was taken to the United States Court of Appeals for the Fourth Circuit. The circuit court reversed and remanded for further proceedings after concluding that

Weatherford and Strom's conduct had violated Bursey's constitutional rights to the effective assistance of counsel and a fair trial. A. 256-64. Petitioners' motion for rehearing and rehearing en banc was denied. A. 265-74. A petition for writ of certiorari to review the decision of the circuit court was filed in this Court and was granted on June 21, 1976, ____ U.S. ____, 44 L.W. 3610, 3738.

Weatherford's Assignment

Weatherford was hired by Strom in August, 1969, as an undercover agent for SLED. His principal assignment was to infiltrate the University of South Carolina and keep Strom informed about what was happening on the campus.

> A. [Strom] During that time, we had a lot of problems at the University of South Carolina, as well as other places, and it was necessary for me to have certain information as to what was happening on the campus or what was going to happen. . . .
>
> Q. Was Mr. Weatherford in a favorable position to serve in a capacity of an under-cover agent?
>
> A. He was . . . because he was a student and he knew people and he was smart, and he knew how to do things and how to get information and to evaluate it.
>
> A. 101-02.

Weatherford was at that time Strom's sole undercover agent at the University, A. 118, and his job "entailed [surveilling and reporting] anything that may create a police problem or a problem for the orderly operation of the University of South Carolina." A. 102. Strom

didn't "point . . . out" Bursey to Weatherford, but he did discuss him with his agent and assumed that Bursey would be surveilled "because he admits he was the organizer." A. 214. Bursey's attorney was told by a SLED agent following the state trial that Weatherford's assignment was actually "to attend the University of South Carolina in an effort to get something on Brett Bursey." A. 92. SLED's specific interest in Bursey was admitted by another agent, Lt. Ronald Cook, who investigated and surveilled Bursey as a routine matter prior to his arrest because he was connected with "radical activities" and was "known to be involved in different incidents." A. 147-48.

Weatherford Makes Contact With Bursey.

As part of his SLED assignment, Weatherford met Bursey who was then a student at the University and joined a University chartered discussion group known as AWARE. A. 235. The two later served as co-chairpersons of AWARE, A. 168-235, and according to Bursey, became close friends. "I considered Jack a close friend, one of a handful of people that I related with socially and politically and saw him quite often—three, sometimes five times a week." A. 24.

Both Strom and Weatherford were deposed prior to trial in federal court and both testified at trial. Weatherford also testified at Bursey's state court trial. The inconsistencies in testimony, particularly Weatherford's regarding his association with Bursey, AWARE and his entire role of informer at the University, were often marked. Strom, for example, consistently maintained that Weatherford had been hired to do undercover work

at the University of South Carolina. Weatherford, however, repeatedly denied at the federal trial that Strom "ever mentioned the University in particular. At least, I don't recall it." A. 161.

> Q. Were you given an assignment by Mr. Strom to infiltrate the University and find out what was going on there?
>
> A. No sir, I was never given an assignment to infiltrate anything.
>
> Q. Were you given an assignment by Mr. Strom to keep your eyes open, to see what was happening at the University of South Carolina?
>
> A. I don't believe he ever mentioned the University in particular. At least, I don't recall it.
>
> * * * * *
>
> Q. I want to ask you again whether or not Mr. Strom ever instructed you to find out what was happening at the University of South Carolina and in particular to find out what was going on with the so-called AWARE group?
>
> A. To the best of my recollection, I don't recall him ever focusing my attention either on AWARE or on the University in particular, to infiltrate or –
>
> A. 160-61.

But Weatherford's prior testimony at the state trial was flatly contradictory. "I made my affiliation with these [AWARE] people because I was a SLED agent. I knew none of them prior to being a SLED agent. I was hired as a SLED agent, and I went out to the UFO, and there I met Mr. Bursey, and I met others in this group, and during this past year I have spent a lot of time with them." A. 235. His later testimony on re-direct in the state court was to the same effect.

Q. Counsel asked you about belonging to these subversive groups like "Aware" and all. Who told you to get into those groups?

A. I went into those groups under instructions of Mr. Strom.

Q. Mr. Strom?

A. Yes, sir.

Q. And in your instructions, were you just to follow what the other people told you to do?

A. Primarily, and report back to Mr. Strom what was going on.

A. 240.

Weatherford also denied at the federal trial and in his deposition that he had established a personal friendship with any of the members of the AWARE group.

Q. Did you form friendships or acquaintanceships with many or most of the other members of AWARE?

A. I certainly was acquainted with most of them.

Q. Did you form friendships with any of them?

A. That would be hard to answer. In the sense that often times I was concerned about them as people, then you might say yes; but in the sense that we were great social and personal friends, then probably the answer would be no.

Deposition of Jack McIver Weatherford, at 43.

As far as Bursey was concerned, had Weatherford "not been working for SLED, [Bursey] would not have been a person with whom I would have chosen to associate." *Ibid.*, at 61; "he seemed somewhat abhorrent to me." *Ibid.*, at 109. Also see A. 190. But Weatherford's testimony in state court was decidedly different:

Q. Mr. Weatherford, you have known Mr. Bursey how long?

A. Since September, of last year.

Q. You have cultivated a good friendship with him?

A. Yes, sir. . . .

Q. You have a lot of friends in this movement, so to speak, do you not?

A. Yes, sir.

A. 234-35.

Weatherford in fact established such close personal ties with Bursey and his circle of friends that he eventually married the roommate of Bursey's wife to whom he had been introduced by Bursey while a SLED agent. A. 43-4, 154.

The Draft Board Incident.

As a result of their stated, mutual opposition to the war in Vietnam, Weatherford and Bursey and several others met on March 19, 1970, and planned a demonstration at the Richland County Selective Service Board to celebrate National Anti-Draft Week. Bursey suggested that they perform "a theatre skit, going into the Draft Board in the daytime and tacking up a notice on the door, condemning it as a health hazard." A. 25, 237. Also see State Trial Transcript, at 112-14. The group decided, however, that later that night they would go to the draft board, paint anti-war symbols on the building and throw a bottle of paint and a brick with an anti-war note tied to it through a window. A. 25-6, 230-34. Weatherford made no attempt to stop the demonstration but was a willing participant in both its planning and execution. *Ibid.* Strom was given advance notice of the plan by Weatherford, but like him he made no attempt to stop it, reasoning thusly:

Q. Now, when you first came into possession of knowledge or information that there was going to be a demonstration there, did you instruct Mr. Weatherford that he ought to attempt to stop it?

A. No, sir.

Q. Can you tell me why you did not do that?

A. Well, if I get information a man is going to rob a safe, if I would instruct him to stop it, I mean, we never would have a violation and all the thieves and crooks would be going wild; so you catch them and take them into the courtroom.

A. 120.

Weatherford, Bursey and Greg Merrick carried out the defacing of the local board in the early A.M. hours of March 20, 1970. A fourth person, Dan Bolding, drove the getaway car. Both Bursey and Weatherford painted a peace symbol on a wall and each threw a brick. SLED and other agents were actually in the Selective Service building at the time, but the plotters came and went undetected. Weatherford promptly called SLED and made arrangements for his and Bursey's arrest. A. 26-9, 220, 226-34, 240-42.

The Co-Defendant Deception.

SLED agents arrested Bursey and Weatherford during the day on March 20, 1970, as they were attending a Student Affairs Committee meeting at the University. They were handcuffed together and taken to the Richland County Sheriff's office. A. 29-30, 173, 242. According to the solicitor, warrants were "issued that day for malicious mischief (sic) to personal property

and malicious mischief (sic) to real property; it later went to the grand jury; and both of them were indicted." A. 129, 140. The two were also charged with criminal conspiracy. State Trial Transcript, at 31. Bursey was charged with illegal possession of a teargas machine, an aerosal device purchased in a local drug store which he had in his pocket at the time of his arrest. A. 30-1, 201.

Bursey remained in jail for approximately 12 days due to difficulties in raising his $12,500 bond. A. 31. Weatherford was released to fellow agents within hours of his arrest and taken out of town for several days. A. 174. In the meantime, Bursey, who was still in custody, was told by SLED agents that Weatherford was also in jail. A. 31-2. Following Bursey's release he and Weatherford met at the home of a mutual friend, also active in the AWARE group, and Weatherford confirmed his fellow agent's misrepresentations to Bursey that he had been in jail for several days before making bail. A. 32-3, 174-75.

To maintain the ruse that Weatherford was a bona fide co-defendant, following Weatherford's release from jail the solicitor made arrangements for a local Columbia lawyer, Frank Taylor, to appear to represent Weatherford. Solicitor Foard testified, "I told Mr. Taylor that—we discussed the facts, as I recall, I told him I didn't want anybody, including people in his office, to know that this man was an undercover agent, and that I would have him [Weatherford] to get in touch with him." A. 129-30. Weatherford made an appointment with Taylor.

A. We talked for ten or fifteen minutes, and he said he knew about the case, and that there was no need to discuss it. He just wanted to see

what I looked like and find out a little bit about me, so he would recognize me if he saw me again, and that was the extent of our conversation.

Q. Did you get the impression that Mr. Taylor knew or felt at that time that his representation of you was purely technical?

A. Yes, sir.

A. 155.

"He just wanted to know what I looked like so that he would know who he was supposed to be representing, and that was the primary function of the meeting." A. 244.[1]

Another reason for retaining Taylor was to have someone with whom Bursey's attorney, Rauch Wise, could confer concerning Bursey and his co-defendant Weatherford's defenses. Weatherford thought that the ACLU had "involvement in the case," A. 244, apparently because Wise was a member of the Board of Directors of the ACLU of South Carolina, a fact Weatherford could have learned from his then fiancee and future wife, who was also a member of the Board of Directors of the ACLU of South Carolina. A. 81. Weatherford needed a lawyer, he reasoned, "so that if the ACLU wanted to contact somebody as my lawyer, then they would have a lawyer to contact instead of them trying to take and represent my case." A. 244. Wise was, however, privately retained. A. 34.

[1] Taylor testified that he had talked with the solicitor, knew that Weatherford worked for SLED, agreed to "represent" him, accepted and expected no fee and knew little about the case except that "it had to do with red paint and a brick through the glass." A. 135-39. He talked with Weatherford on only one occasion but did not undertake to do anything on his behalf in preparation for a trial. A. 137, 139.

Weatherford duly told Bursey that Taylor was his attorney and the information was passed on to Wise. A. 32-3, 83, 173. Wise made an appointment with Taylor to discuss their clients' cases. "The conversation might have lasted five or ten minutes. The sum and substance of it was, I think we both agreed there was an informant, and he had no more idea who the informant was than I did ... And he also mentioned that he would file a motion for severance, due to the fact that he didn't want his client tried with my client, due to what he considered the adverse reputation of my client, would work to the prejudice of his client." A. 84, 137.[2] Wise was completely deceived by Taylor's purported representation of Weatherford and assumed that Weatherford was being routinely represented as a co-defendant in an actual criminal case. A. 85.

Wise requested a preliminary hearing for his client which was held on April 13, 1970. A. 201. At the hearing, the assistant solicitor was careful to preserve the fiction that Weatherford was an actual defendant.

Mr. Monteith: And the second [warrant] is *The State v. Brett Allen Bursey and Jack M. Weatherford*.... As I understand it counsel here, his clients are not present, but he would like to read into the record—oh, Mr. Bursey has come in, let the record show then that Brett Allen Bursey is present. Do you represent Jack Weatherford?

Mr. Wise: No, sir.

Mr. Monteith: Then this is a Preliminary Hearing on Brett Allen Bursey alone. Is that correct?

The Court: Yes, that's right.

[2] Taylor, "made sort of a joke out of [his representation of a co-defendant of Bursey's]" in discussing the matter with a colleague. A. 136.

Mr. Wise: I'm sorry?

Mr. Monteith: You represent Bursey only and not Weatherford?

Mr. Wise: That's right.

Mr. Monteith: Do you want to state for the record the fact that you represent him, and just that you represent Bursey?

A. 201-02.

Weatherford was not called as a witness at the preliminary hearing.

Intrusion Upon the Right to Counsel.

Following Bursey and Weatherford's arrests, Weatherford continued to work as an undercover agent at the University. As Strom explained it, "we had other problems at the university, and I discussed it with the solicitor, and we thought it was a good idea to keep him under cover, you know, for a while longer, to see what other things he could come up with, so we could maintain order on the campus." A. 105. Weatherford's original instructions were not modified in any way but remained fully in force.

Q. Did you give him any additional or different instructions after March 19th, 1970?

* * * * *

A. No, not that I remember.

* * * * *

Q. And you didn't modify your instructions to Mr. Weatherford in any way following the arrest?

A. No, sir.

Q. And as his boss you perceived that he would function in the same way as he had before?

A. As far as I knew, he could, yes.

Q. So I mean you didn't try to hire any other agents to do some of the things that he had been doing?

A. No, sir.

Q. He was still your man at the University and you felt he could function that way?

A. Yes, sir.

A. 222-23.

As part of his continuing role of undercover agent at the University, Weatherford helped "trash" the Administration Building in protest over the Kent State killings and the escalation of the war in Vietnam. A. 44. He applied for membership in the Venceremos Brigade "in order to find out–generally, those people appeared to be more radical, say, than a lot of other radicals, and I thought it worthwhile at least to find out what was going on." A. 176. He counseled with his co-defendant and advised him to jump bail and flee the jurisdiction. A. 42. He also continued to investigate Bursey for SLED.

In an affidavit in support of his motion for summary judgment, Weatherford conceded that at the time of Bursey's trial and "for some time before such date he was engaged in investigating certain activities of Brett Allen Bursey, and that at the trial of Bursey on such date he did testify against Bursey in a prosecution for malicious destruction of real property." A. 11. In a separate affidavit Strom confirmed Weatherford's continuing investigation of Bursey following the arrest by SLED: "Before, during and after the trial of Brett Allen Bursey for the crime of malicious destruction of real property . . . that one Jack M. Weatherford was at such times an undercover agent of SLED; and that the defendant had general knowledge that Weatherford was

engaged in investigating the activities of Brett Allen Bursey." A. 10.

As a result of his continuing investigation of Bursey, his status as a co-defendant and his "friendship" for Bursey, Weatherford met Bursey and Wise on several occasions prior to Bursey's trial. On at least two of these occasions, the co-defendants' trials were discussed in detail. A. 34-5, 65-7, 79-82. The first meeting was arranged by Bursey and took place at his home in mid-April shortly after his release from jail. The lawyer and the co-defendants discussed the pending cases generally and whether or not there might be an informer, Weatherford's representation and his plans to seek a severance. A. 35-7, 65-7, 79-82. Bursey was suspicious because the arrests occurred so soon after the demonstration. Weatherford agreed that an informer could be involved and expressed the opinion that perhaps Merrick was an agent since he had never been arrested and charged. *Ibid.*[3] During the discussions Weatherford made every effort to maintain the fiction that he was a co-defendant. *Ibid.* The three also discussed whether or not Weatherford might be approached by law enforcement officers to secure testimony against Bursey in exchange for leniency for Weatherford's brother who was at that time serving a sentence for burglary.[4] "Jack categorically denied that

[3]Solicitor Foard indicated that Merrick was indeed an informer. "There were some more or less informers involved. I'm not sure even who they worked for; for example, there was one [Merrick] who—when the case was called for trial—was out of the country. I don't know whether he ever worked for SLED or not.... I'm not sure who he was an informer for.... There were informers working for the FBI; informers working for this agency; and I'm not sure that I know who was who." A. 133-34.

[4]Weatherford's brother was indeed much upon Weatherford's mind at that time. Taylor recalled that during his one conversation with Weatherford "the impression I had from talking to him mainly was that he was interested in me helping him get his brother's time reduced." A. 136.

he had been approached and asserted that he would not cooperate with law enforcement agencies, and I felt Jack to be very sincere in that." A. 36, 55. The three also discussed trial tactics, including the testimony Merrick might give and the testimony the state would have available if Merrick did not testify. A. 36-7.

After the April meeting and prior to Bursey's trial Weatherford went to Hilton Head Island, South Carolina, for a weekend vacation with fellow SLED agents. While there, he thought he might have been seen by a friend of Bursey's. To preserve the co-defendant deception, Weatherford got in touch with Bursey upon his return to the University. He lied to him. He told Bursey that his benefactor, A Dr. Hardwick, the man whom he said had posted his bond and retained his lawyer, had insisted that he discuss his case with the police. Weatherford told Bursey "that Dr. Hardwick said, 'It's the least you can do, Jack, is to go down and talk with them,' and Dr. Hardwick arranged a meeting with law enforcement officers . . . with Jack at Hilton Head. Jack came to me and volunteered this information. He said that "I went to Hilton Head; I met with Sonny Clark; they wanted me to turn state's evidence; they offered me a deal,' is what it amounted to, 'and I rejected it' . . . the thing I specifically recall, of course, is his assurance that he would not cooperate with them." A. 54-5, 74-5, 179.

The seond, formal attorney-client meeting in which Weatherford participated took place at the home of Weatherford's fiancee shortly before Bursey's trial. The matters discussed at the first meeting were discussed again, as well as legal strategies and tactics which had been developed during the interim. A. 37-40, 81-3. According to Bursey, "Mr. Weatherford was totally in

our confidence. We had no restraints about discussing the case with him. We assumed that he was a co-defendant and that he shared some liability in the matter." A. 38-9. Wise and Bursey were informed that Merrick was out of the country and would not be present as a witness at the trial. The discussion therefore turned to whom the witnesses might be against Bursey. Weatherford again denied that he would testify against Bursey or be a witness for the state. A. 82. He also agreed not to be present in the courtroom on the day of Bursey's trial. A. 39, 71, 82, 184. Bursey and Weatherford had discussed the possibility of Weatherford's being subpoenaed but concluded that in such instance he would have available the Fifth Amendment privilege against self-incrimination. A. 76, 82-3. Final defense strategy was also discussed at the meeting, that in Merrick's absence and the absence of testimony from Weatherford, the State would not be able to prove by direct testimony that Bursey was present at the local board, and "there would be a fighting chance with the jury under those circumstances." A. 82. It was also determined that Bursey would not testify since "I could add nothing and would open the cross-examination field for a whole range of things that might be prejudicial in the eyes of the jury." A. 39.

The State Trial.

Prior to the trial of Bursey's criminal case in state court, Wise filed a motion with Judge John Grimble for discovery of the identity of informants. Judge Grimble disqualified himself and the motion was renewed prior to trial before Judge Badger Baker. The motion was denied. A. 85.

When Bursey's case was called for trial in the state court, the prosecution's first witness was Weatherford. He implicated Bursey fully and directly in the crime charged. A. 225-34. Weatherford's testimony and his disclosure as an informer altered dramatically the defense tactics. It was determined that Bursey would have to testify. A. 86. Bursey, however, in reliance upon Weatherford's promised silence was not prepared for direct and cross-examination. A. 39-40, 86.

As for Lawyer Wise, the revelation of Weatherford's identity "completely changed the complexion of the case in a matter of a few minutes. It—needless to say—disoriented me to some extent to realize that . . . this person who I thought I had known turns out to be an undercover SLED agent. It was disarming, to say the least." A. 88. It impaired his ability to conduct the defense and cross-examine Weatherford. A. 88-9. The defense was also denied the opportunity to do a background check on Weatherford because of his repeated representations that he would not be a witness. *Ibid.* Wise believes that Weatherford was subject to impeachment. Following the trial he learned that Weatherford had been arrested on a narcotics charge earlier in 1969. A. 89-90. Wise's understanding was that the charges were dismissed in consideration of Weatherford's doing undercover work for SLED. *Ibid.*

By being deceived about the strength of the state's case, Wise made no serious effort at plea bargaining prior to trial. A. 40-1, 90. Following Weatherford's testimony, however, a short recess was taken and Wise discussed the possibility of entering a plea with the trial judge. The judge indicated that if a plea of guilty was entered to both counts Bursey would be sentenced to

one year on each count to run consecutively for a total of two years. The state's position during plea bargaining was that Bursey should be sentenced to confinement. A. 87-90. Wise concluded that his plea bargaining position was diminished after the trial had started and rejected the proffered sentence. *Ibid.* Bursey was convicted by the jury of malicious destruction to real property and sentenced by the judge to eighteen months of imprisonment. A. 257. None of his co-conspirators were ever brought to trial.

Both Strom and Weatherford denied that they passed any information to the prosecution about Bursey's defense strategy. At the federal trial Strom at first denied that he had *any* contact whatsoever with Weatherford following Bursey's arrest. A. 116. He modified his testimony, however, when confronted with his prior deposition testimony, A. 121-22, and admitted that Weatherford "made some phone calls' I'm not sure how many after that [arrest]." A. 222.

Weatherford conceded that during the entire time he was an agent he was in constant contact with Strom and SLED, on the telephone, when he came to Strom's office at SLED headquarters every other week to pick up his pay check, A. 163 and Deposition of Jack McIver Weatherford, at 22-3, 69, and that he had been giving Strom reports for "approximately a year." A. 240. But like Strom his memory as to post-arrest contact with SLED concerning Bursey had considerably dimmed by the time this case was heard in the district court. Weatherford denied or couldn't recall "any further contact" with SLED "with regard to this matter . . . until the time of the trial," A. 155, 158, 165-66. He denied discussing the Hilton Head deception with Strom. A. 166-67.

Weatherford's memory proved unreliable at the federal trial as to other matters. He didn't, for example, remember defacing the draft board. "Mr. Bursey said I wrote the word 'Peace' and I possibly did, if he said that, but I actually do not recall having done it." A. 168-69, Cf. Weatherford's state court testimony, A. 231-32, 236. He couldn't remember the names of people who planned or executed the draft board demonstration, A. 169-70, and he couldn't recall who Merrick was. A. 170. "I didn't know the other people involved in the incident at the time, so, I assume that that is the name of the person who was with us; but at the time, I don't believe I ever knew his name—I mean, I could have, perhaps, but, if so, I had only met those other people within the two days of the incident; and I don't think I ever saw any of them again after the incident; so I'm not too positive on the names." A. 170. At the state trial, however, Weatherford was very positive on names. "Well, we parked on Senate Street, and Mr. Bursey, and Mr. Merrick and myself got out, and Mr. Bolder stayed inside the car." A. 231.

At the federal trial Weatherford remembered almost nothing of the meetings or conversations with Wise and Bursey.

> Q. All right, sir, now, you have heard testimony, have you not, from Mr. Wise and Mr. Bursey about certain meetings they say they had with you. I just want to make clear now, you do recall the last meeting or the one before trial, the one involving rain and the box of carry-out fried chicken. You recall that?
>
> A. I recall the testimony, yes, sir, but I don't recall the incident.
>
> Q. You don't recall such a meeting at all?
>
> A. No, sir. I recall the testimony yesterday.

Q. Your testimony is that you don't remember that you actually were there under those circumstances?

A. Yes, sir, that's correct.

Q. And your testimony also is you have no recollection of any meeting shortly after Mr. Bursey's release—and I believe it was in the second or third week of April of 1970—you have no recollection meeting with Mr. Bursey and Mr. Wise?

A. No, sir.

A. 181-82.

Weatherford later admitted that he had seen Bursey and Wise together, but still insisted that he remembered almost nothing about their conversations. A. 182-84.

There was one thing which Weatherford remembered clearly when he testified at the federal trial. "I definitely wouldn't have [discussed Bursey's case] with the solicitor." A. 158. Weatherford did, however, as the court of appeals noted, talk with the solicitor who prosecuted the case prior to trial, A. 261, 133, 191-94, and he testified against Bursey.

Bursey moved for production of Weatherford's reports, telephone logs, etc. but learned that undercover agents were not required to keep records and that the only records in Weatherford or SLED's possession pertaining to Weatherford (or Bursey) were Weatherford's pay vouchers. A. 115, 186.[5]

[5] From August, 1969, through September, 1970, when he left SLED, Weatherford was paid $100 a week for a total of $5,300. A. 103.

Weatherford's Need for Cover.

Strom said that Weatherford's cover wasn't needed for anything he was working on at the University following Bursey's arrest, A. 125, nor was it needed for any other SLED assignment he might be given.

Q. Mr. Strom, were you concerned that Mr. Weatherford maintain his cover following Mr. Bursey's arrest?

A. I wasn't concerned, because everybody doing undercover work, occasionally, somebody is going to find out about it and make him—know who they are; no great concern.

Q. It wouldn't have damaged your factfinding mission to have Mr. Weatherford's cover blown?

A. I didn't give it any thought really. Often a man breaks a pretty good-sized case . . . everybody involved, they are going to get together, and they are going to figure out as best they can what happened. They know something has happened or they wouldn't have got caught; so, I figure on a pretty good-sized case, an undercoverman, his identity is going to be known anyway.

* * * * *

A. I really didn't put much emphasis on how effective he could be after this anyway.

Q. After the arrest?

A. Yes, sir.

Q. So, you had no reason to want to see his cover remain? Is that it?

A. I wasn't going to announce it in the newspaper, but I wasn't going to be in shock if it—if they made him.

A. 124-25.

The Court then asked Strom if there was "anything particular that Weatherford was working on . . . at the

University, where you had to keep his cover for a month, six weeks, two months?" Strom answered: "No, sir." A. 125.

Weatherford was not afraid for his personal safety after he testified against Bursey and declined Strom's offer of protection. A. 107. He felt that he was valuable to SLED even after the trial and that "in due time, had I stayed, I could have been just as effective in most any capacity out there." A. 180. He turned down, however, an offer to be an "above-the-ground sort of agent" for SLED and decided to attend graduate school instead. A. 180, 189.

The Prosecution's Witness.

Weatherford knew from the date of Bursey's arrest that he might be a witness against Bursey. "From the time of the incident, it was always a possibility and, as I said, I don't remember any particular point at which a decision was made. I was supposed to be in the courtroom that day if needed and I was there." Deposition of Jack McIver Weatherford, at 112. Also see A. 176. Before testifying, Weatherford was told "to speak loudly" and "to be polite and straight forward with any answers" during cross-examination. Deposition of Jack McIver Weatherford, at 121.

Strom understood that "at some point in time on all your big cases . . . you have to let them testify, and then you give them a regular job and give them another assignment." A. 123. When the solicitor decided before trial that he wanted to use Weatherford as a witness, he asked Strom if he objected. Strom didn't. A. 105.

Strom, by his own admission, has had extensive law enforcement training. He is a graduate of the FBI National Academy. A. 110. "I have been to schools in Washington . . . had the best instructors in the country, and I know a man's rights–at least I think I do;" A. 109. Strom was familiar with the Sixth Amendment right to counsel and knew that law enforcement agents could not constitutionally have access to defense counsels. *Ibid.*

Although Strom knew that Weatherford "might" be a witness and that he was continuing his investigation of Bursey, he indicated that had he "known" Weatherford would be a witness he would have taken him off Bursey's case. "I wouldn't have had him to meet with them." A. 107. The reason for removing him would have been to protect Bursey's Sixth Amendment right to counsel. A. 109. Strom, moreover, conceded that what had actually happened in the case was unconstitutional.

Q. Had somebody reported to you that one of your agents was participating in defense consultations, would you permit that sort of thing?

A. No, sir.

Q. Why would you not?

A. Because it wouldn't be ethical; wouldn't be legal.

Q. Do you think that would be a violation of the Sixth Amendment right to confer–

A. As far as I know–

Ibid.

The Court Below.

The district court dismissed Bursey's §1983 complaint for the reasons that he had not shown that Weatherford actually communicated defense tactics to the prosecutor, A. 249, and that there was no constitutional requirement that an undercover agent disclose his identity and "avoid all contacts with an accused and his attorney prior to trial." A. 254. As to Strom, the court held that even conceding a violation by Weatherford of "some constitutional right of Bursey . . . there is no testimony connecting defendant Strom with any of such acts allegedly committed by Weatherford." A. 255.

The court of appeals in a unanimous opinion reversed. It held that Weatherford, who was fully acquainted with Bursey's trial strategy, conferred with the prosecutor prior to trial and testified against Bursey, was a member of the prosecution, and that his intrusion into the attorney-client relationship

> was not inadvertent but was knowingly permitted by the prosecution. That the instrusion was not for the purpose of attaining information but was to maintain Weatherford's cover is, we think, of no consequence. We conclude whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial. . . . In the context of a civil suit, our holding that Bursey's Sixth Amendment right to counsel was violated sustains his suit irrespective of any showing of substantial prejudice to his defense.
>
> A. 260-61.

The court of appeals also held that Bursey's right to a fair trial had been violated by the concealment of

Weatherford's identity, his denials that he would be a witness against Bursey, together with the "devastating effect" of his actual testimony. A. 261-62. As to Strom, the court found that his "own decisions directly caused the violation of Bursey's constitutional rights," in that "(1) he participated in the decision to maintain Weatherford's cover; (2) he entrusted the details of perfecting the cover to Solicitor Foard . . . and (3) that he concurred personally in the decision to allow Weatherford to testify." A. 262. The court of appeals reversed and remanded the case for determination if Strom and Weatherford were entitled to the benefit of a "*Strickland*- type good faith defense." A. 264.

SUMMARY OF ARGUMENT

This case involves whether the prosecution may deliberately and systematically misrepresent to a defendant after arrest and prior to trial, the evidence it will present, and as a direct result of its deceits, intrude upon attorney-client counsels, discover the complete defense strategy, manufacture surprise and disarray the defendant's presentation at trial.

The Sixth Amendment guarantee of the right to counsel is fundamental. *Gideon v. Wainwright*, 327 U.S. 335 (1963). To insure that the right is effective and that trials are not mere window dressing, the right to counsel applies at critical pre-trial stages when consultation and thorough going investigation and preparation are vitally important. During this period a defendant is entitled to be free of indirect and surreptitious intrusions upon the right to counsel of the sort which occurred in this case. *Massiah v. United States*, 377 U.S. 201 (1964).

If the prosecution is allowed to intrude upon the confidential attorney-client relationship, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. *Fisher v. United States*, ____ U.S. ____, 96 S.Ct. 1569, 1577 (1976). Clients would be reluctant to confide in their attorneys because of fear that the government might intercept evidence or based upon the interceptions, indict for additional crimes. In addition, the government might discover the strategy of the defense thereby securing subtle but real benefits from knowing the planned procedure or even the state of mind of the defendant and his counsel with respect to the trial. Defendants who are thus reluctant to discuss their cases with their attorneys will not receive informed legal advice or the effective assistance of counsel guaranteed by the Sixth Amendment. In such cases, all defendants, the guilty as well as the innocent, will be unable to establish their defenses. As a result, the adversary system would be reduced from a fact finding process designed to separate the guilty from the innocent to a meaningless ritual to facilitate the confiction and incarceration of persons charged with crimes. Moreover, if the government is permitted promiscuously to intercept attorney-client communications increased violations will occur and the fact finding process will become less and less reliable, leading to disrespect for law enforcement and disregard for the Constitution. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

To safeguard the protection of the Sixth Amendment this Court has held that intrusions into defense counsels invalidate the trials at which they occur and that proof of disclosure or other prejudice is not required as a condition for relief. *Black v. United States*, 385 U.S. 26

(1966); *Hoffa v. United States*, 385 U.S. 293 (1966); *O'Brien v. United States*, 386 U.S. 345 (1967). Public policy requires that where the government is the law breaker and creates a great potential for harm that it bear the consequences of its misconduct. Proof of knowledge or use by the prosecution of intercepts is generally impossible to adduce since offending officials cannot be expected to confess their guilt. Moreover, proof or prejudice in the use of intercepts is in most cases unascertainable. To insure that the protection of the Constitution is not nullified, fairness requires that defendants not be given impossible burdens of proof. The rule which does not require a defendant to show prejudice from invasion of the right to counsel is supported by other decisions of this court. See, *Peters v. Kiff*, 407 U.S. 493 (1972), concluding that a white defendant has standing to complain of exclusion of blacks from his jury; *Tumey v. Ohio*, 273 U.S. 510 (1972), holding that it is inherently prejudicial to allow a judge to sit in judgment of cases in which he has a financial interest; and *Estes v. Texas*, 381 U.S. 532 (1965), finding unconstitutional a televised trial, even though the specific mischief and prejudice could not be shown with particularity. Like the right to a fair and impartial judge and jury, the right to counsel is too fundamental to allow courts to indulge in speculation as to the degree of prejudice flowing from its denial. *Glasser v. United States*, 315 U.S. 60 (1942); *Hamilton v. Alabama*, 368 U.S. 52 (1961).

Although it is not necessary for Bursey to show that intercepts were disclosed to the prosecution or that prejudice resulted to his defense from their use, there was knowledge by the prosecution of attorney-client communications in this case and there was prejudice to

the defense. Here, the prosecution resorted to an elaborate scheme of ruses and deceptions involving a sham defendant, phoney lawyer, continuing investigation, and deliberate misrepresentations, to secure access to Bursey's defense counsels, discover his trial strategy and affirmatively misrepresent to him and his lawyer the evidence the state would present. As the court of appeals found, Weatherford was a member of the prosecution. In gaining access to defense counsels, the prosecution gained an unconstitutional adversarial advantage insuring that Bursey was deprived of an opportunity meaningfully to prepare his case, explore plea bargaining or otherwise to enjoy the benefits of counsel at trial.

This case does not depend upon a breach of the common law attorney-client privilege for relief. The scope of the Sixth Amendment right to counsel involved here and the common law attorney-client privilege are not co-equal. One is a broad constitutional concept, the other only a rule of evidence. In any case, Weatherford's conduct did violate the confidential nature of attorney-client communications. As *Continental Oil Company v. United States*, 330 F.2d 347 (9th Cir. 1964), and *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965), establish, communications between lawyers and co-defendants are within the evidentiary privilege.

Whether the government must open its files to a defendant or disclose the identity of informants prior to trial is not an issue here. This case involves whether the state may manufacture surprise by deliberately misrepresenting to a defendant the case it will present against him. To allow the state to do so would undermine the process of presenting and evaluating evidence thereby making the criminal justice system less reliable,

and disserve the ends of justice by depriving defendants of the opportunity intelligently to plea bargain. *Williams v. Florida*, 399 U.S. 78, 106 (1970).

The prosecution has a duty to deal fairly with persons charged with crime. That duty has included the obligation not to offer, or refuse to correct, perjured testimony or suppress material exculpatory evidence. *Brady v. Maryland*, 373 U.S. 93 (1963), *Alcorta v. Texas*, 355 U.S. 28 (1957). Unfairness has also been found to result where the prosecution failed to disclose the identity of informers whose testimony was relevant and might be helpful to the accused, *Roviaro v. United States*, 353 U.S. 53 (1957), and where procedures are used which provide an opportunity for prosecutorial vindictiveness by allowing the indictment of defendants for more serious offenses where they prosecute de novo appeals. *Blackledge v. Perry*, 417 U.S. 21 (1974). The prosecution dealt unfairly with Bursey here and the state's conduct is below acceptable constitutional levels.

There was no legitimate need for maintenance of Weatherford's cover. He never made a single arrest as a SLED agent, he testified at only one trial–Bursey's, and he could not recall a single case in which his activities led to a conviction. Although his value as a law enforcement agent was minimal, the record discloses that he vandalized the Administration Building at the University of South Carolina, he participated in destruction to the Selective Service building and he went to Georgia to investigate "radicals." Strom stated that following Weatherford and Bursey's arrest Weatherford was not working on "anything particular" where he needed to maintain his cover. A. 125. Strom also said that he was not concerned about Weatherford's cover after the arrest and doubted his continued effectiveness as an undercover agent. There is also no evidence to show that

Weatherford's life was in danger. Weatherford was offered protection by Strom after Bursey's trial but declined it. A. 107.

Even if maintenance of the undercover agent's secrecy was a legitimate law enforcement need, that need cannot outweigh a defendant's right to assistance of counsel and a fair trial. *Roviaro v. United States, supra*. The state may protect its legitimate interests in confidentiality in ways which do not involve disclosure or denying persons accused of crimes the protection of the Constitution. In this case, of course, it was the state which revealed the informer's identity at trial.

Strom's decisions directly caused the denial to Bursey of the effective assistance of counsel and a fair trial. Strom participated in the decision to maintain Weatherford's cover, intrusted the details of perfecting the cover to Solicitor Foard and concurred in the decision to allow Weatherford to testify. It is impossible to conclude that Strom should not reasonably have known that defense contact would occur. *Wood v. Strickland*, 420 U.S. 308 (1975). The court of appeals correctly held that Strom's personal involvement in the violations of Bursey's rights was satisfied by the decisions and actions which he undertook. Viewed against the principle of tort liability that a person is responsible for the natural consequences of his actions, *Monroe v. Pape*, 365 U.S. 167 (1961), Strom is answerable for the injury done to Bursey.

ARGUMENT

This case does not involve the "mere presence" or non-prejudicial, inadvertent intrusion of an undercover agent in attorney-client discussions, nor does it involve

whether the prosecution must affirmatively disclose the names of witnesses and informants to the defense. The issue which this case involves is whether the prosecution may deliberately, systematically and gratuitously lie to a defendant about the evidence the state will present, and as a direct result of its deceit, intrude upon attorney-client counsels, discover the complete defense strategy and totally disarray the defendant's presentation at trial. The court of appeals properly held that it could not.

I.

A STATE COURT DEFENDANT IS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE A PAID INFORMER POSING AS A CO-DEFENDANT GAINS ACCESS TO AND INFILTRATES THE DEFENSE CAMP, AFFIRMATIVELY MISLEADS THE DEFENDANT AND HIS COUNSEL AS TO HIS TRUE IDENTITY AND THE NATURE OF THE STATE'S CASE, PARTICIPATES IN ATTORNEY-CLIENT DISCUSSIONS AND DISCOVERS THE ENTIRE DEFENSE STRATEGY, COLLABORATES WITH THE PROSECUTION, SUBSEQUENTLY TESTIFIES AGAINST THE DEFENDANT AT THE STATE TRIAL, AND WHERE THE DEFENDANT IS DEMONSTRABLY PREJUDICED BY THE DECEIT.

A. The Sixth Amendment protects the attorney-client relationship from governmental intrusion during critical pre-trial stages.

The right to counsel guaranteed by the Sixth Amendment is "fundamental and essential to a fair trial," and

extends to both serious and "petty" state criminal prosecutions through the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963), and *Argersinger v. Hamlin*, 407 U.S. 25 (1972). To ensure that the right is effective and not merely theoretical, this Court has held that an accused must be given reasonable time to secure counsel, *Powell v. Alabama*, 287 U.S. 45, 71 (1932); of his or her own choice, *Ibid.* at 53; who has no conflict of interest but is loyal, *Glasser v. United States*, 315 U.S. 60, 76 (1942); that indigent defendants are entitled to the appointment of counsel in all cases which could result in imprisonment, *Argersinger v. Hamlin, supra*; and, that sufficient opportunity must be afforded for consultation, preparation, *Reynolds v. Cochran*, 365 U.S. 525, 531 (1961), and to prepare a defense, *Avery v. Alabama*, 308 U.S. 444, 446 (1940). The decisions of this Court have not given the Sixth Amendment "a narrowly literalistic construction," but have understood it "to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact-finding process that has been constitutionalized in the Sixth and Fourteenth Amendments". *Herring v. New York*, 422 U.S. 853 (1975), 95 S.Ct. 2550, 2553. Also see, *Ferguson v. Georgia*, 365 U.S. 570 (1961), and *Brooks v. Tennessee*, 406 U.S. 605 (1972).

The right to counsel commences at any official interrogation of the accused, before or after indictment, *Escobedo v. Illinois*, 378 U.S. 478 (1964), *Miranda v. Arizona*, 384 U.S. 436 (1966), or at any critical stage of the proceedings, *United States v. Wade*, 388 U.S. 218 (1967), *Coleman v. Alabama*, 399 U.S. 1 (1970), for the right to counsel at trial would be "a very

hollow thing" if effective representation could be subverted during pre-trial stages when legal aid and advice are critical. *In re Groban*, 352 U.S. 330, 344 (1957) (Black, J., dissenting). "One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial'." *Escobedo v. Illinois, supra*, 378 U.S. at 488[6] quoting from *Ex parte Sullivan*, 107 F.Supp. 514, 517-18 (D. Utah, 1952).

This Court has characterized the time after which a defendant is charged until the beginning of trial, the time during which the intrusions involved in this case were made, as "perhaps the most critical period of the proceedings . . . when consultation, thorough-going investigation and preparation [are] vitally important," *Powell v. Alabama, supra*, 287 U.S. at 57, and has held that during this period a defendant is entitled to be free of indirect and surreptitious intrusions upon the right to counsel. *Massiah v. United States*, 377 U.S. 201, 205-07 (1964). This is so because effective pre-trial preparation depends upon total disclosure between lawyer and client which in turn depends upon the integrity and security of attorney-client communications. *Black v. United States*, 385 U.S. 26 (1966); *O'Brien v. United States*, 386 U.S. 345 (1967); *Hoffa v.*

[6] As noted in *Escobedo, supra*, 378 U.S. at 488, n.9, the Soviet criminal code, admittedly no model for a constitutional democracy, allows denial of counsel during the investigation.

United States, 385 U.S. 293 (1966).[7] Also see, *Hickman v. Taylor*, 329 U.S. 495, 510 (1947):

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.[8]

and *United States v. Nobles*, 422 U.S. 225, 238 (1975).

B. Substantial private and public interests depend upon the integrity of the attorney-client relationship.

The interests served by protecting attorney-client discussions from governmental intrusion are those of individual defendants and society at large. If the prosecution is allowed to intrude upon attorney-client communications one obvious result will be that "the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal

[7] In its brief in *Hoffa*, the government conceded the precise point.

> [W]e believe . . . the Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceeding. Brief, at 71.

[8] In addition to the Sixth Amendment's protection of attorney-client confidences, this Court has acknowledged the common law privilege involving disclosures made by a client to an attorney in order to obtain legal assistance. *Fisher v. United States*, ____ U.S. ____, 96 S.Ct. 1569, 1577 (1976). Also see the discussion, *infra*, at 67-10.

advice." *Fisher v. United States*, ____ U.S. ____ (1976), 96 S.Ct. 1569, 1577. Clients would be reluctant to confide in their attorneys for a number of reasons. They might not wish to implicate others in crimes, or publish embarrassing information about themselves. The government might discover through interception important evidence which it could use to convict the defendant or indict for other crimes. Or, as in this case, the prosecution might discover the strategy of the defense—who its witnesses will be, their order of call, their testimony, or indeed if the defense will call any witnesses at all, and as a result whether the prosecution will have final summation before the jury;[9] whether the defendant will testify and if so his weaknesses or strengths or fears as a witness and his vulnerability to impeachment; strategems of the defense to blunt the prosecutions' case; defense strategy for preservation of the record for use on appeal; and the style, strength and weaknesses of the attorney for the accused—to name but a handful of the hundreds of factors that constitute the defense of a criminal case. In our adversary system such matters are crucial. See, *e.g. Brooks v. Tennessee*, 406 U.S. 605, 612 (1972): "Whether the defendant is to testify is an important tactical decision

[9] In South Carolina, a defendant is permitted to have final argument before judgment in the event that he introduces no evidence during trial. *State v. Gellis*, 158 S.C. 471, 155 S.E. 8[illegible] (1930). The Court recognized the value of making final argument in *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550, 2555 (1975): "In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment."

as well as a matter of constitutional right."[10] The prosecution's knowledge of defense strategy can be as harmful to the defendant as its knowledge of directly incriminating evidence.[11]

If the government is permitted to intercept attorney-client disclosures, a defendant will, for the reasons stated above, be reluctant to discuss his case with his attorney. But without such discussion, counsel will be unable to perform the traditional role of planning and preparing the defense, *Geders v. United States*, ___ U.S. ___ (1976), 44 L.W. 4420, *Brooks v. Tennessee*, *supra*, examining witnesses, *Faretta v. California*, 422 U.S. 806 (1975), presenting evidence and making arguments, *Ferguson v. Georgia*, 365 U.S. 570 (1961), *Herring v. New York*, 422 U.S. 853 (1975), 95 S.Ct. 2550, and perfecting any possible appeal, *Douglas v. California*, 372 U.S. 353 (1963), *Anders v. California*, 386 U.S. 738 (1967). Under the circumstances, a defendant will not receive informed legal advice or the effective assistance of counsel guaranteed by the Sixth

[10]The government acknowledged this fact in its brief in *Hoffa*: "the vice in having a government informant in the defense camp during a trial is that he may overhear and transmit privileged communications–i.e., conversations between a defendant and his attorney or other expressions of defense strategy." Brief, at 103.

[11]See ***Taglianetti v. United States***, 398 F.2d 558, 570 (1st Cir. 1968), ***affirmed on other grounds***, 394 U.S. 316 (1969), where the Court took note of the "subtle benefits that might consciously or unconsciously accrue to the government in knowing the planned procedure, or even the state of mind of the defendant and his counsel *with respect to the trial*, quite apart from hearing affirmative evidence, or leads to evidence." (emphasis in original).

Amendment.[12] A defendant with ineffective counsel is essentially no better off than one without any counsel, for in either case, "though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell v. Alabama*, 287 U.S. 45, 69 (1932).[13]

The defendant who is inhibited from making disclosures to his attorney of matters involving his defense because of fear of interception by the government, severely hampers his defense. But the defendant who *does* make disclosures which are intercepted is doubly disadvantaged. Not only is his defense deprived of its full effectiveness, but the government's position in the trial is enormously enhanced. The adversary system, upon which the administration of our criminal laws depend, would be reduced from a fact finding process designed to separate the innocent from the guilty, *Herring v. New York*, *supra*, 95 S.Ct. at 2555, *United States v. Nobles*, 422 U.S. 225, 238 (1975), to a meaningless ritual to facilitate the conviction and incarceration of persons charged with crimes. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

[12]The American Bar Association's Code of Professional Responsibility, EC 4-1 & n.2 (1971), recognizes the importance of full disclosure in the preparation and presentation of an adequate criminal defense.

[13]The protection of the Sixth Amendment, of course, extends to all defendants, those who might be found guilty as well as those found innocent. "Time out of mind this Court has reversed convictions for the most heinous offenses, even though no doubt about the guilt of the defendants was entertained. It reversed because the mode by which guilt was established disregarded those standards of procedure which are so precious and so important for our society." ***Sacher v. United States***, 343 U.S. 1, 28 (1952) (Frankfurter, J., dissenting).

Governmental intrusion upon attorney-client communications offends other public and social interests distinct from those of defendants in individual cases. If the government is permitted to intercept communications in derrogation of the right to effective assistance of counsel, continued and increased violations will be encouraged—and will occur.[14] A system of criminal law enforcement which thus depends upon intrusions upon the right to counsel will become less reliable and more prone to abuses than a system which depends upon extrinsic evidence gathered through acceptable law enforcement techniques. *Escobedo v. Illinois, supra*, 378 U.S. at 488-89. Disrespect for law enforcement and disregard for the Constitution will follow. As Mr. Justice Brandeis said in his dissenting opinion in *Olmstead v. United States*, 277 U.S. 438, 485 (1928):

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

[14] Judge Washington of the District of Columbia Circuit opined in *Caldwell v. United States*, 205 F.2d 879, 881 (D.C. Cir. 1953), that the unlawful use of government agents to participate in defense counsels was "no doubt extremely rare." However, the increasing number of lower court cases involving the promiscuous use of informers to intercept attorney-client communications suggests that the practice is now becoming wide spread. See, *infra*, at 57-61, and Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities, Book III, pp. 225-270, and Book II, pp. 67-82.

C. Decisions of this Court have uniformly held that governmental intrusion into defense counsels invalidates the trial at which it occurs, and that proof of disclosure or other prejudice is not required.

The impropriety of governmental intrusions upon attorney-client communications has never been questioned by this or any lower court, although lower courts have often disagreed on the definition and consequences of intrusion. During 1966 and 1967 this Court decided four cases involving interception of attorney-client communications: *Black v. United States*, 385 U.S. 26 (1966) (per curiam); *Hoffa v. United States*, 385 U.S. 293 (1966); *Schipani v. United States*, 385 U.S. 372 (1966) (per curiam); and *O'Brien v. United States*, 386 U.S. 345 (1967) (per curiam). In each of the per curiam cases the Court ordered new trials for the defendants upon a showing that law enforcement agents by the use of electronic surveillance had intercepted attorney-client conversations. Significantly, none of the defendants were required to show that the intercepted information had been disclosed to the prosecution or establish other prejudice to their defense.

In *Black*, FBI agents overheard conversations between the defendant and his lawyer by way of an electronic listening device which had been installed for a purpose unrelated to Black's tax prosecution. On appeal of the case, the Solicitor General advised the Court that prosecuting attorneys had been in possession of logs of the monitored conversations but were unaware at the time of trial that they included attorney-client matters. Moreover, the Solicitor General advised that prosecuting attorneys "found nothing in the F.B.I. reports or

memoranda which they considered relevant to the tax evasion case." 385 U.S. at 28. The Court, however, set the conviction aside and ordered a new trial to "permit the removal of any doubt as to Black's receiving a fair trial." *Ibid.*, at 29. Justices Harlan and Stewart dissented on the grounds that the defendant's remedy should be remand for a prejudice hearing rather than reversal. Nonetheless, in *O'Brien*, decided later in the same term, the Court followed its rule of automatic reversal set out in *Black*. In *O'Brien*, the FBI tapped the telephone of one of O'Brien's business associates. O'Brien used the phone on two occasions. On the first, he discussed his forthcoming trial with someone. On the second, he asked his lawyer to file an application relating to the territorial conditions of his release on bail. A log of the conversations was made but was never given or communicated to attorneys for the Department of Justice who were prosecuting the case. The Court summarily vacated the conviction, citing *Black*, and remanded the case for a new trial. Justices Harlan and Stewart again dissented, noting that in *Schipani*, "the Court properly vacated the conviction because the Solicitor General conceded that evidence used at trial was tainted." 386 U.S. at 347.

In *Hoffa v. United States*, decided after *Black*, but before *Schipani* and *O'Brien*, the Court indicated that interception of attorney-client communications by an informant was as unconstitutional as interception by electronic surveillance. Hoffa, at his trial for Taft-Hartley Act violations (Test Fleet trial), attempted to bribe jurors. An associate in whom he confided during the trial, Edward Partin, was a government informer. Partin reported the jury tampering attempts to the prosecution as well as other matters relating to the Test

Fleet case defense strategy, i.e., a group of prospective character witnesses were being instructed about their testimony by Hoffa's lawyers. The Test Fleet trial ended in a hung jury but Hoffa and others were later convicted, based upon Partin's testimony, for trying corruptly to influence jurors in violation of 18 U.S.C. §1503. The Court affirmed the jury tampering conviction and found no Sixth Amendment violation because the statements overheard and transmitted by the informer to the prosecution concerning the jury tampering, as opposed to the defense strategy in the Test Fleet case, were not "made in the presence of counsel, in the hearing of counsel, or in connection in any way with the legitimate defense of the Test Fleet prosecution. The petitioner's statements related to the commission of a quite separate offense—attempted bribery of jurors—and the statements were made to Partin out of the presence of any lawyer." 385 U.S. at 308. The Court assumed, however, but without deciding, that had Hoffa been convicted at the Test Fleet trial, "the conviction would presumptively have been set aside as constitutionally defective. Cf. *Black v. United States*," 385 U.S. at 307, because of Partin's intrusion upon the confidential relationship between the defendant and his counsel. In short, even though interception of the attorney-client discussions would invalidate the trial at which it occurred, as far as the jury tampering trial was concerned, no attorney-client relationship existed or was penetrated at the time Partin made the interception.[15]

[15]The opinions on denial of certiorari in *Granello v. United States*, 386 U.S. 1019 (1967), indicate that this interpretation of *Hoffa* is correct. *Granello* involved surveillance of the defendant which had no connection with his present case. The dissenters, nonetheless, felt that the lack of connection should be further "exposed in the record of this case so that we may, at least, be sure that the Government's trepassory surveillance has not infected the trial of these petitioners." 386 U.S. 1021.

The cases just discussed establish that intrusion by a government agent into the legal camp of the defense deprives the defendant of the Sixth Amendment right to counsel, and that proof of disclosure to the prosecution or other prejudice is not required. That this reading of the cases is correct is enforced by the reliance in *Hoffa* upon two cases from the Court of Appeals for the District of Columbia Circuit, *Caldwell v. United States*, 205 F.2d 879 (D.C. Cir. 1953), and *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1952), and the Court's assumption that the two cases were "rightly decided." 385 U.S. at 307. In *Coplon*, the court of appeals reversed the denial of a motion for new trial and directed that the defendant be given the opportunity to prove her allegation that conversations between her and her attorney before and during her trial had been electronically overheard by FBI agents. Such eavesdropping, if shown, was held to be a violation of the Fifth and Sixth Amendments, and defendant was entitled to a new trial at which she could be free of surreptitious interception of communications with her attorney and enjoy the right of the effective assistance of counsel. 191 F.2d at 760. The court catalogued state and federal cases which "unequivocally establish" that an accused is denied the effective aid of counsel if he or she is denied the right of confidential consultation, and concluded that "[t]he prosecution is not entitled to have a representative present to hear the conversations of accused and counsel." 191 F.2d at 749. The court of appeals also rejected the contention that Coplon was entitled to relief only if she could prove that the interception yielded evidence which was

introduced against her.[16] Quoting the language from *Glasser v. United States*, 315 U.S. 60, 76 (1942) that:

> [t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial,

the circuit court held that

> the right to have the assistance of counsel is so fundamental and absolute that its denial invalidates the trial at which it occurred . . . regardless of whether prejudice was shown to have resulted from the denial. 191 F.2d at 759.

Caldwell v. United States, similarly reversed a conviction where an informer had intruded upon attorney-client consultations. Caldwell was accused of attempted tampering with a jury in a criminal trial of another person. The prosecution hired an undercover agent, Bradley, to ascertain who might have assisted Caldwell in the alleged offense. Bradley became acquainted with Caldwell and his attorney, and was eventually solicited to work for the defense. Bradley reported this to the prosecution and was instructed not to work for nor take money from the defense. Subsequently, Bradley reported to the prosecution that the defense had offered to pay him large sums to steal the prosecution's file on Caldwell. As a result, the prosecution caused Bradley to extend his activities with a view toward convicting persons associated with the conspiracy to steal the files. He thereafter gained full access to defense planning and reported to the prosecution both on

[16]The trial judge in denying the motion for a new trial found that "there was no such evidence suggested, and counsel does not point out a line, or even a scintilla of testimony procured in this way." 191 F.2d at 759.

the current charge and the alleged plot to steal the files. He did so through the trial and Caldwell was convicted. Six days later, Caldwell filed a motion for a new trial on the grounds that he had just discovered Bradley's double dealing. The motion was denied. In *Caldwell*, as in this case, the government disputed that Bradley actually interfered with or prejudiced the defense. Nonetheless, the court of appeals reversed noting that Bradley, even though he had been solicited to work for the defense, had intruded "upon conferences, supposedly open only to the most loyal, between accused *and his counsel*," and that Caldwell need not show actual prejudice in order to receive a new trial. 205 F.2d at 881, n. 10 (emphasis in original). Caldwell's conviction was reversed and the case remanded for a new trial.

> We recognize that the prosecutor in this case was faced with a real dilemma, once the possibility of a theft of the files had been reported by Bradley. We do not question that he then acted with what must have seemed high motives, and certainly with active diligence. But high motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of crime and his counsel. The Constitution's prohibitions against unreasonable searches, and its guarantees of due process of law and effective representation by counsel, lose most of their substance if the Government can with impunity place a secret agent in a lawyer's office to inspect the confidential papers of the defendant and his advisers, to listen to their conversations, and to participate in their counsels of defense. Conduct of that sort on the part of our Government is no doubt extremely rare. But if it does occur a conviction tainted by it cannot stand.
>
> 205 F.2d at 881.

Not only did this Court assume in *Hoffa* that *Coplon* and *Caldwell* had been correctly decided but the government in its brief in *Hoffa* repeatedly approved both circuit court opinions. "Specifically, we do not challenge the holding or underlying principles of the decisions on which petitioners rely most heavily—*Caldwell v. United States*, 205 F.2d 879 (C.A.D.C.), and *Coplon v. United States*, 191 F.2d 749 (C.A.D.C.), certiorari denied, 342 U.S. 926." (Brief, at 71.)[17]

D. The conduct of the state here was more irresponsible, flagrant and prejudicial than that condemned by this court in prior cases.

Unless the principals set out in *Black, O'Brien, Hoffa, Coplon* and *Caldwell* are to be abandoned by this Court, the opinion of the court of appeals that Bursey was denied the assistance of counsel in violation of the Sixth Amendment must be affirmed. Weatherford, upon instructions from prosecutor Foard and Strom, as part of a continuing investigation of Bursey, through an elaborate scheme of misrepresentations, distortions, falsifications and out-right lies, e.g., the Hilton Head episode, convinced Bursey and his attorney that he was a co-defendant and friend of the defense. As a natural consequence of the government's deception, Weatherford discovered the entire defense strategy prior to trial. At the same time, he repeatedly denied that he would be a witness at trial, thereby deceiving the defense

[17] In its amicus brief filed in this case, the government has apparently changed its position. Although it does not argue that *Coplon* and *Caldwell* were wrongly decided, it does argue that this Court should not adopt a "prophylactic rule" involving intrusions into defense counsels.

about the evidence the state would present and the nature of its case. In doing so, he insured that Bursey would be surprised at trial and deprived him of the opportunity to prepare a defense for the case that was actually presented.

The facts here are more egregious than those of any of the cases decided or relied upon by this Court in resolving similar Sixth Amendment violation claims. In none of the earlier cases was there affirmative misrepresentation by the prosecution about the nature of the government's case. Here, as the court of appeals found, Weatherford repeatedly denied, to Bursey and to Bursey's lawyer, that he would be a witness "up through the day before his appearance at trial." A. 262. He also denied that he would even be present in court when Bursey was tried.

In both *Black* and *O'Brien* the interception of attorney-client conversations was accidentally procured through investigations of matters unrelated to the defendants' pending trials. The interceptions were also made by persons who were not members of the prosecution or working on its behalf. Here, the investigation of Bursey was a continuing one; undertaken by a person who was actually a member of the prosecution;[18] one of the *stated* purposes of the government's deceit which caused the intrusion was to have someone present with whom Bursey's lawyer could discuss Bursey and Weatherford's cases; and, the

[18]The court of appeals found that "the record establishes that Weatherford, fully acquainted with Bursey's trial strategy, talked with Solicitor Foard, who prosecuted the case, before trial and, of course, testified against Bursey. On these facts we find him to have been a member of the prosecution." A. 261.

"someone" was lawyer Taylor—yet another member of the prosecution team.

In *Black* and *O'Brien*, it does not appear that either prosecuting attorneys or members of the prosecution team involved in the pending cases had knowledge at the time of trial of the substance of intercepted attorney-client communications. Here, Weatherford, a member of the prosecution, intercepted and had knowledge of Bursey's defense and attorney-client confidencies. Thus, even if disclosure or knowledge by the prosecution of attorney-client communications is regarded as a condition for a Sixth Amendment violation, *Black* and *O'Brien* notwithstanding, such knowledge by Weatherford, a member of the prosecution, would satisfy the condition.[19]

Even were Weatherford regarded merely as a police officer, and not technically a "member" of the prosecution, his knowledge of defense counsels should be imputed to the prosecution. Such a rule has been formulated by this Court and consistently followed by lower courts in implementing *Brady v. Maryland*, 373 U.S. 83 (1963), so that the suppression of favorable evidence by the police and other agents is attributable to the prosecutor. In *Giglio v. United States*, 405 U.S. 150, 154 (1972), the failure to disclose a promise made to a witness by a lawyer in the United States Attorney's office not to prosecute in exchange for testimony against Giglio was imputed to the prosecutor.

[19]The prosecution's knowledge of attorney-client communications would be only one way in which a defendant might be prejudiced. Prejudice would flow, as in this case, from misrepresentation by an informer of the evidence the state will present, the creation of surprise and denial of the opportunity to prepare for trial.

"The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government."[20] A contrary rule would discourage communications between the prosecutor, the police and other government agencies and result in the decline of efficient law enforcement.

E. Strong public policy requires that the Government bear the consequences of its misconduct and that persons accused of crime not be deprived of protection against intrusions upon the Sixth Amendment right to counsel.

The rule that interception of attorney-client communications by the state invalidates the trial at which it

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[20] And see, *Moore v. Illinois*, 408 U.S. 786, 810 (1972) (Marshall, J., concurring in part and dissenting in part); *Barbee v. Warden*, 331 F.2d 842, 846 (4th Cir. 1964) ("the police are part of the prosecution"); *United States v. Bryant*, 439 F.2d 642, 640 (D.C. Cir. 1971) (" 'prosecution' is certainly broad enough to include investigation."); *United States v. Banks*, 383 F.Supp. 389, 395 (D.S. D. 1974) (the prosecution "is saddled" with an FBI agent's negligent or deceitful non-disclosure of evidence.); *Emmett v. Ricketts*, 397 F.Supp. 1025, 1041 (N.D. Ga. 1975) (a clinical psychologist and hypnotist who treated a prosecution witness "was as much a member of the prosecutorial team as any of the police officers investigating the murders."); *United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973); *United States v. Eley*, 335 F.Supp. 353 (N.D. Ga. 1972); *Nash v. Purdy*, 283 F.Supp. 837 (S.D. Fla. 1968); *Evans v. Kropp*, 254 F.Supp. 218 (E.D. Mich. 1966); *Boone v. Padenick*, ____ F.2d ____, (4th Cir. 1976), No. 76-1090 ("where material evidence which tends to exculpate the defendant is not disclosed, such failure is not neutralized because it was in the hands of the police rather than the prosecution.").

occurs by interfering with the right to counsel and that proof of disclosure to the prosecution or other prejudice is not required, is necessary to effectuate the purposes of the Sixth Amendment. The chilling effect, indeed the freezing effect, upon attorney-client communications which a contrary rule would have, would be exceeded only by abrogation of attorney-client confidentiality altogether. To conclude otherwise is to ignore experience.

Most defendants, even if there is proof of interception, as there is here, will not be able to show that the prosecution knew of or used the intercepts. No official accused of misconduct can be expected to confess guilt. Quite the contrary, as here, they loudly protest their innocence. Since proof of use or knowledge would depend in almost every case upon a confession of guilt, requiring such proof would render the protection of the Sixth Amendment illusory. As for proof of prejudice from the use of attorney-client intercepts, that will in most cases be simply unascertainable. There is no reliable way to determine precisely how a case would have been tried in the absence of the Sixth Amendment violation or the effect of such trial upon the jury.

Black and the cases which adopt its logic, do not rest upon the assumption that prosecutors and law enforcement officers automatically and systematically lie or suppress the truth.[21] These cases are grounded, rather,

[21] The record in this case does, however, disclose systematic lying and suppression of the truth by the state. Not only do the inconsistencies in testimony and lapses of memory of witnesses at the trial demonstrate evasion, but the admitted conduct of the prosecution is a web of distortions, half-truths, and out-right lies. Weatherford's repeated denials, for example, that he had been approached by law enforcement officers, his later assertions that he had approached law enforcement officers but had spurned their entreaties, his protestations that he would not testify or be present in court the day of Bursey's trial, were, quite simply, deliberate lies. The unpleasant but plain truth of the matter is that the state has rarely been capable of the truth throughout its proceedings against Bursey.

in the basic and fundamental nature of the right to counsel in our constitutional scheme, and in the knowledge that absent the rule they establish, defendants would rarely, to the point of never, be able to establish their entitlement in interception cases to Sixth Amendment protection. Where the state has jeopardized the Sixth Amendment right to counsel and created a great potential for harm, it is only fair that it bear the consequences of its misconduct, and that defendants not be given an impossible burden of proof, the effect of which would be to defeat the constitutional right.[22] As this court said in *Glasser v. United States*, 315 U.S. 60, 75-6 (1942), involving a defendants' right to loyal counsel:

> To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of . . . [his attorney] as counsel for . . . [a co-defendant] is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

The rule in *Glasser* has been followed in subsequent cases involving denial of counsel. In *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961), the Court held that absence of counsel at arraignment violated due process and that "we do not stop to determine whether prejudice resulted. . . . In this case . . . the degree of prejudice can never be known." The same analysis was applied in *White v. Maryland*, 373 U.S. 59, 60 (1963),

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[22]"A rule of constitutional principal is useless, if the burden of proof necessary to vindicate it is so heavy as to preclude its being effective." *United States ex rel. Cooper v. Denno*, 221 F.2d 626, 631 (2nd Cir.) (Frank, J., concurring opinion), *cert. den.*, 349 U.S. 968 (1955).

and the same result reached: "[W]e do not stop to determine whether prejudice resulted. . . ."

In other cases involving rights deemed fundamental to a fair trial, this Court has similarly not indulged in speculation as to the degree of prejudice flowing from denial. In *Peters v. Kiff*, 407 U.S. 493, 504 (1972), it held that a white defendant had standing to complain of exclusion of Negroes from his jury and that no showing of prejudice to his defense resulting from the exclusion need be shown.

> It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce. . . . Consequently, it is necessary to decide on principle which side shall suffer the consequences of unavoidable uncertainty. . . . In light of the great potential for harm latent in an unconstitutional jury-selection system, and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants, rather than giving it to too few. (footnote omitted.)

This Court has also held that regardless of whether there is a showing of actual prejudice, constitutional protection is denied a defendant by state trial practices that create the likelihood or even the appearance of unfairness. *In re Muchison*, 349 U.S. 133, 136 (1955). Thus, in *Tumey v. Ohio*, 273 U.S. 510 (1927), the Court ruled that a judge who had a financial interest in the outcome of a trial could not sit in judgment, even though he might resist the temptation to influence the case. In *Turner v. Louisiana*, 379 U.S. 466, 473 (1965), the Court concluded that a jury could not constitutionally try a defendant where it had been placed in the protective custody of deputy sheriffs who were also the

chief witnesses for the prosecution, even though there was no showing of actual prejudice.

> And even if it could be assumed that the deputies never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in their continual association throughout the trial between the jurors and these two key witnesses for the prosecution.

In *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963), a murder conviction was reversed because of pre-trial publicity in the form of a televised interview of the accused in which he admitted guilt. Even though only three members of the jury panel had seen the interview, and even though they all stated that they could give the defendant a fair trial, the Court did "not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.'" Also see, *Marshall v. United States*, 360 U.S. 310 (1959), *Irvin v. Dowd*, 366 U.S. 717 (1961).

The same rule was also applied in *Estes v. Texas*, 381 U.S. 532, 544 (1965), to hold unconstitutional a televised trial even though "one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced." And see *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

Like the right to a fair and impartial judge and jury, the right to counsel has been regarded as so fundamental that its denial or dillution is unconstitutional even in the absence of a showing of actual prejudice. Respondent does not believe that any

argument advanced in this case by the state justified abandonment of this well established constitutional principal.

F. Decisions of lower Courts protect attorney-client communications from interception by the Government.

The *Black, O'Brien, Hoffa, Copeland, Caldwell* line of cases has been followed by other courts. *United States ex rel. Cooper v. Denno*, 221 F.2d 626 (2nd Cir. 1955), *cert. den. sub nom. Cooper v. Denno*, 349 U.S. 968 (1955), involved an allegation that a plainclothes police officer had been planted in a seat reserved for spectators near the defense table at trial. The court of appeals held that the accused failed to prove the allegation of planting the officer. But the court said, "[i]f the allegation, without more, is supported by evidence which will justify such a finding, then petitioners' fundamental rights have been denied. That such action resulted in no prejudice to the accused does not void or excuse the violation. *Glasser v. United States*." 221 F.2d at 628.[23]

In *United States v. Rispo*, 460 F.2d 965 (3rd Cir. 1972), the prosecution revealed after conviction that one of the defendants at trial had participated in the acts on which the charges were based as a paid

[23]See *United States v. Lebron*, 222 F.2d 531 (2nd Cir. 1955), where there was an informer present at a meeting with defendants, counsel and others at which nothing concerning the defense except how to raise defense funds was discussed. The court recognized that if an informer intruded upon a conference between witnesses and counsel even with the accused absent the conviction would be void.

government informer. Though it was not shown that the informer "took part in conferences relating to the trial," his attorney, who was unaware of his client's true identity for much of the trial, "participated in pretrial and trial conferences and strategy sessions, and discussed those strategy sessions with him." 460 F.2d at 973, n. 14, 976 n. 22. Noting that "[t]he possibility of prejudice implicit in such a situation is unlimited," the court, citing *Black* and *O'Brien*, held that the defendant was entitled to a new trial. 460 F.2d at 976 n. 22. "The ends of justice are not served by such deception, and even the appearance of justice becomes unattainable." 460 F.2d at 977. Other cases to like effect include *Via v. Cliff*, 470 F.2d 271, 275 (3rd Cir. 1972), a damage action under §1983 by an inmate alleging denial of access to counsel prior to trial: "There is no requirement that Via show that his 'counsel's preparedness for trial was affected in any way.' "; *Taglianetti v. United States*, 398 F.2d 558, 570, n. 12 (1st Cir. 1968); *aff'd per curiam*, 394 U.S. 316 (1969) ("an intrusion relevant to the current prosecution" would entitle defendant to a new trial.); *Brzozowski v. Randall*, 281 F.Supp. 306, 311 (E.D.Pa. 1968) (rejecting the contention that no Sixth Amendment violation would result unless "detrimental evidentiary matter" was extracted during the period of denial of counsel.); *McArthur v. Pennington*, 253 F.Supp. 420, 429 (E.D.Tenn. 1963) (acquitted plaintiffs awarded $5,100 each for violation by police of protected rights including putting "them in jail without giving them an opportunity to phone their lawyer.")

The state argues that a number of lower courts have either expressed disagreement with the *Black, O'Brien, Hoffa* line of cases, or adopted new rules for resolving

the constitutionality of interception of attorney-client communications. More specifically they contend that lower courts have rejected the so-called *per se* rule which relieves the defendant of the burden of showing disclosure or prejudice where there has been capture of attorney-client communications. The cited cases, however, are distinguishable on their facts from this case, and upon examination, in spite of their dicta, generally do not constitute as decided a departure from *Black, O'Brien* and *Hoffa*.

In *United States v. Scott*, 521 F.2d 1188 (9th Cir. 1975), there was no attorney-client relationship present to intrude upon. The defendant represented himself *pro se* and was deemed to have waived or renounced the right to counsel. *Ibid.*, at 1191. The court also said that Scott has so widely published his defense as to waive any claim to defense privacy as a matter of due process. *Ibid.*, at 1193. In *United States v. Crow Dog*, 532 F.2d 1182 (8th Cir. 1976), although there was evidence that the informer had infiltrated the American Indian Movement with which Crow Dog was associated, there was apparently no direct evidence that the informer was present during any discussions of defense strategy relevant to Crow Dog's trial. *Crow Dog* acknowledges, however, that a Sixth Amendment violation would have occurred had the agent gained information relating to the defense through an intrusion into the attorney-client relationship. 532 F.2d at 1198. In *United States v. McCord*, 509 F.2d 334 (D.C. Cir. 1974), *cert. den.* 95 S.Ct. 1656 (1975), the court concluded that any disclosures of confidences were voluntary on the defendant's part.

In *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973), the attorney-client communications overheard by state prison officials were unrelated to the federal

offense charged. *See United States v. Brown*, 317 F.Supp. 531, 535 (E.D.La. 1970). There was also testimony that Brown knew his conversations were being monitored. 317 F.Supp. at 533. In *Manuel v. Salisbury*, 446 F.2d 453 (6th Cir. 1971), there was no proof of the existence of an attorney-client relationship or that communications had been intercepted. In *United States v. Fanning*, 477 F.2d 45 (5th Cir. 1973), there was no proof of the existence of an attorney-client relationship. In *United States v. Cooper*, 397 F.Supp. 277 (D.Neb. 1975), there was no evidence that the agent overheard anything relating to trial strategy or any communications between the defendants and their lawyers. In *State of South Dakota v. Long*, 465 F.2d 65 (8th Cir. 1972), the conversations were ones which the prosecutor could hear and were recorded in open court. In *United States v. Aldivisio*, 424 F.2d 20 (10th Cir. 1970), no attorney-client relationship existed at the time communications were overheard. In *United States v. Choate*, 527 F.2d 748 (9th Cir. 1975), no information relating to the defense was communicated to the agent prior to revelation by him of his identity.

Also see *United States v. Rosner*, 485 F.2d 1213 (2nd Cir. 1973); *United States v. Zarzour*, 432 F.2d 1 (5th Cir. 1970), and *United States v. Mosca*, 475 F.2d 1052 (2nd Cir. 1973), *cert. den.*, 412 U.S. 948 (1973). *Zarzour* concerned a paid informant assisting the defense. He was paid to assist the government in matters unrelated to the prosecution. The court viewed the activity with "a jaundiced eye," but concluded that *Coplon, Caldwell, Hoffa* and *Black* required a showing that the government's evidence was "tainted." 432 F.2d at 3. *Zarzour* is incorrect in this conclusion since only in *Coplon* was the evidence tainted, and *O'Brien v. United States* made it clear that proof of taint was not

required. The *Mosca* case involved interference only in that the defendant-informer appeared at two pre-trial conferences attended by the trial judge and counsel for both sides. The court found no prejudice but condemned the practice as "beneath the high standards of professional conduct expected of government counsel." 475 F.2d at 1061.

G. Bursey was in fact prejudiced by the State's deceit and there was interception by the prosecution of attorney-client communications.

Even were this Court to decline to follow the rule of *Black, O'Brien* and *Hoffa* and conclude in Sixth Amendment cases that proof of disclosure or use by the prosecution of intercepted attorney-client communications or other prejudice to the defense is a condition for relief, the opinion of the court of appeals would still be correct. Weatherford, as the court of appeals found, *was* a member of the prosecution. He intercepted attorney-client communications and as a result was "fully acquainted with Bursey's trial strategy." A. 261. The court of appeals also found that Weatherford talked with the prosecutor prior to trial. Both Weatherford and Solicitor Foard deny that they discussed defense trial strategy—but they certainly could have. If Bursey's burden is to prove that they did, then realistically the guarantee of effective assistance of

counsel in such cases as this means very little.[24] But even if Weatherford is not regarded as a member of the prosecution, and even if no disclosure or use by the prosecutor of intercepted communications were found to exist, Bursey was still prejudiced by the state's deceit. As the court of appeals found, some of the prejudice resulted from Weatherford's repeated misrepresentations to Bursey and his lawyer of the evidence the state would present.

The Solicitor General contends that Weatherford did not "volunteer misleading information." Brief, at 45. That is simply not so. Weatherford said that he had trouble raising his bail and remained in jail for several days. He volunteered misleading information when he said that. Weatherford said he was a co-defendant. He volunteered misleading information when he said that. Weatherford said that Dr. Hardwick had retained lawyer Taylor to represent him. He volunteered misleading

[24]The Solicitor General in his amicus brief speculates that the conversation between Foard and Weatherford "evidently consisted of no more than Foard's indicating to Weatherford the possibility that he might have to call him as a witness." Brief, at 44. Weatherford, of course, knew when he went to Solicitor Foard's office that he would be a witness. "I knew I was going to Court, and I guess there was no question at that point." A. 194. As for the contents of their discussion, the Solicitor General fails to note, apparently due to lack of access to those portions of the record not included in the printed appendix, that somebody actually coached Weatherford about his testimony. It was explained to Weatherford that he must "speak loudly" and "be polite and straight forward with any answers" during cross examination. Deposition of Jack McIver Weatherford, at 121. The Solicitor General also says "[n]or . . . is there any evidence that Weatherford was 'fully acquainted' with respondent's trial strategy." Brief, at 44 n.28. That assertion reflects, quite simply, a total unfamiliarity with the record. See, *supra*, at

information when he said that. Weatherford said that he was going to be tried separately from Bursey. He volunteered misleading information when he said that. Weatherford said that he had gone to Hilton Head at the insistence of Dr. Hardwick to talk with law enforcement agents about his case. He volunteered misleading information when he said that. Weatherford said that he would not testify against Bursey or be present in court the day of the trial. He volunteered misleading information when he said that. The government's assertion that Weatherford did not "volunteer misleading information" is, upon the facts of this case and as found by the court of appeals, flatly inaccurate.

The citation to the record which is said to support the Solicitor General's assertion (A. 253) involves, not whether Weatherford volunteered misleading information, that is conceded, but whether the information volunteered about the severance of Weatherford's trial from Bursey's, and Taylor's apparent lack of interest in Weatherford's case, should have in fact misled Bursey. The district court felt that it should have put him "on notice." The court of appeals "wholly" disagreed. "We wholly disagree with the court below that Weatherford's . . . indication that he would seek a severance of his own trial should have put Bursey and his lawyer on notice 'that Weatherford might an agent.' " A. 262. The court of appeals also found that Weatherford's general conduct was deceptive, and that whether or not Bursey should have been "put on notice" was irrelevant. "It is not a defense for appellees to show that in spite of the prosecutor's best efforts to conceal the truth a more astute victim might not have been deceived. Such an approach is a caricature of the *Brady* principal." *Ibid.* It

might be argued that Bursey should not have been deceived. But nowhere in this case has it ever been argued, except in the Solicitor General's brief, that Weatherford didn't try to mislead the defense or that he didn't volunteer misleading information.[25]

Other prejudice to Bursey, as the court of appeals found, was the denial of an opportunity to do a background check on Weatherford for purposes of cross-examination, to consider whether plea bargaining might be the best course and to attempt to counter the devastating impact of eyewitness identification. And as lawyer Wise admitted, his ability to conduct the defense generally was substantially impaired after the shocking revelation of the co-defendant's identity.

In *Black, O'Brien, Hoffa, Coplon* and *Caldwell*, as here, the government intruded or permitted intrusions into the attorney-client relationship. But in none of the former did the government deliberately misrepresent to the defendant and his attorney what the prosecution's case would be, thereby manufacturing surprise and insuring that the defendant would be unable to prepare for the case actually presented. *Cf. Coleman v. Alabama*, 399 U.S. 1 (1970) and *United States v. Wade*, 388 U.S. 218 (1967). Bursey's trial was not a fact finding process by equally contending adversaries such

[25]The Solicitor General's argument that Weatherford did not attempt to mislead is as extraordinary as are its contentions that Bursey's defense was not disrupted by the state's deceit and that it made "little difference to the defense whether Weatherford or someone else was the informant." Brief, at 43. The record citation which is said to support the position is to cross-examination of Lawyer Wise involving plea bargaining. But as Wise and Bursey testified, the fact that Weatherford was the agent made all the difference in the world. See, *supra*, at .

as is contemplated by our system of criminal justice. It was an ambush. See, infra, at .

H. Weatherford intruded upon the defense camp.

The state argues at length that Weatherford did not intrude into Bursey's defense camp but was an invitee. Thus, it reasons, no Sixth Amendment violation could have occurred. The contention is not supported by the record. As the court of appeals found, the intrusion here "was not inadvertent but was knowingly permitted by the prosecution." A. 260. The court of appeals also concluded that the intrusion was knowingly arranged by the prosecution. *Ibid.* The record fully substantiates the court of appeals' findings. Weatherford, it must be remembered, by his own admission and by Strom's as well, continued to investigate Bursey after the arrest. To assist in the investigation, Solicitor Foard and Strom resorted to an elaborate scheme of deceits—the arrest and bail deception, the joint indictment, the phoney attorney ruse, the Merrick ploy, the severance, the Hilton Head fabrication, the informer's pledges of loyalty and his promises not to be a witness. As a direct consequence of these acts, and as part of his continuing investigation of Bursey, Weatherford gained access to defense counsels and discovered Bursey's entire trial strategy.

It is a torture of the language to contend that Weatherford did not intrude upon the defense camp. He did precisely the thing which he was paid and instructed to do. The contradictions inherent in the government's arguments are apparent. It argues on the one hand that Weatherford needed cover to continue his investigations of Bursey and others. But in the same

breath, it argues that Bursey was not investigated at all—that Weatherford was a passive invitee. *Cf. Hoffa v. United States*, 385 U.S. 293, 295 (1966), where the contention that Partin was not "placed" in the defense camp was regarded as "verbal controversy." Also see the government's brief in *Hoffa*.

> We recognize, however, that this is not the end of the inquiry. There remains the contention that the government took impermissible advantage of Partin's presence in Nashville and his willingness to report what he heard to the government. In line with our acquiescence in the principles underlying the *Caldwell* and *Coplon* decisions (p. 71, *supra*), we agree that if the government had seized on the opportunity (which was not of its making) to obtain defense secrets or other privileged information from him in violation of the *Caldwell* and *Coplon* decisions, a Sixth Amendment violation would have occurred. (Brief, at 84) (Footnotes omitted.)

The district court, although it found against Bursey, recognized that the natural consequence of the various deceits practiced in the case was to throw the co-defendants together and to facilitate discussion of their cases. For example, the court noted that lawyer Wise and Weatherford had discussed the way in which Taylor intended to defend Weatherford. "This was a natural reaction of a younger attorney trying to learn from an older, more experienced attorney." A. 249. By the same token, nothing could have been more natural than that Weatherford and Wise would also talk about Bursey's case. That, as the court of appeals found, is exactly what they did. A. 261.

I. Respondent does not depend upon a breach of the common law attorney-client privilege for relief, but the privilege was violated in this case.

The state argues that by "inviting" Weatherford into attorney-client discussions Bursey "waived" any privileged or confidential relationship, citing 8 Wigmore, Evidence §2311 (McNaughton Rev. 1961).[26] Brief for Petitioners, at 12. Bursey denies that Weatherford was an "invitee," but even if that were so, and even if it were true that the common law attorney-client privilege had been waived, all that would result would be that Bursey and his attorney, as far as the privilege was concerned, could be compelled to disclose confidences made in Weatherford's presence. But what Bursey and Wise might have to disclose is not an issue in this case. The issue is whether there was interference with the Sixth Amendment right to counsel.

The Sixth Amendment right to counsel and the common law attorney-client privilege are no co-equal. One is a broad constitutional principle, the other only a rule of evidence.[27] Surreptitious interception of

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[26]Wigmore defines the common law attorney-client privilege as follows:

> (1) Where legal advise of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself, or by the legal adviser, (8) except the protection be waived.
>
> 8 Wigmore §2292.

[27]The latter is said "to be strictly construed within the narrowest possible limits," *Radiant Burners, Inc. v. American Gas Assoc.*, 320 F.2d 314, 323 (7th Cir.), *cert. den.*, 375 U.S. 929 (1963), while the former has never been given "a narrowly literalistic construction." *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550, 2553 (1975).

attorney-client communications, for example, according to Wigmore, would not violate the Sixth Amendment's guarantee of the effective assistance of counsel. According to Wigmore, "[o]ne who overhears the communication, whether with or without the client's knowledge, is not within the protection of the privilege. The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy." 8 Wigmore, Evidence §2326 (McNaughton Rev. 1961). The attorney-client privilege is not engaged in such cases since neither the attorney nor the client is called upon to divulge confidences. The interceptor however, according to Wigmore, is not within the privilege and could be compelled to testify as a matter of evidence law.

Because the state misapprehends the nature of the attorney-client privilege, and regards it as co-equal with the Sixth Amendment, its analysis of *Coplon v. United States*, 191 F.2d 749 (D.C.Cir. 1951), is faulty. The attorney-client privilege had nothing to do with the ruling in *Coplon* that the government's conduct was unlawful. *Cf. Hoffa v. United States*, 385 U.S. 293 (1966). Similarly, this case does not depend upon a violation of the attorney-client privilege.

Although Bursey does not depend upon a violation of the common law attorney-client privilege for relief in this case, it appears that the state did in fact violate the common law privilege. The general rule is that the presence of third parties, not agents of either the client or attorneys, destroys the confidential nature of attorney-client communications. But there are exceptions to the general rule, and one of them is that communications between lawyers and co-defendants are within the privilege. The leading cases allowing a

privilege for co-defendant exchange of information are *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964) and *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965). In *Continental*, attorneys for two witnesses who had testified at a grand jury proceeding exchanged memoranda that they had prepared involving their clients' testimony. The court quashed subpoenas directed to the attorneys to disclose the memoranda concluding that they were confidential and within the attorney-client privilege. *Hunydee* involved a pre-indictment conference between two defendants and their respective attorneys. At trial, one of the defendants and her counsel were permitted, over objection, to testify concerning the conference. The court reversed and remanded for a new trial noting that the rule announced in *Continental* "is that where two or more persons who are subject to possible indictment in connection with the same transactions made confidential statements to their attorneys, these exchanges, even though they are exchanged between attorneys, should be privileged to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings." 355 F.2d at 185. The court accordingly held that the defendant's admissions to his attorney, even though made in the presence of a co-defendant and her attorney, were within the attorney-client communication privilege, and that it was error to have allowed the attorney and the co-defendant to testify.[28]

Weatherford's presence in attorney-client discussions, because he was theoretically a co-defendant, should similarly not breach the protection afforded by the attorney-client privilege.

[28]See "Attorney-Client Privilege," 8 Col. J.L. & Soc. Prob. 179, 182-89 (1972).

II.

THE STATE'S DECEITS AND AFFIRMATIVE MISREPRESENTATIONS OF ITS CASE DENIED RESPONDENT A FAIR TRIAL.

This case does not involve whether a defendant in a criminal case is entitled to discover the identity of informers prior to trial. *Cf. Roviaro v. United States*, 353 U.S. 53 (1957). It does involve, however, whether the state may deliberately lie to a defendant about the evidence it will present.

The function of our adversary system of criminal justice is to ascertain the facts so that a reliable determination of guilt or innocence can be made. Whether or not the prosecution is required to disclose the evidence it intends to use to facilitate that fact finding process,[29] it surely should not be entitled actively to subvert it by deliberately misleading the defendant as to the evidence it intends to use.

If the prosecution is allowed to deceive a defendant, as it did here, then the defendant will of necessity be unable to prepare properly for trial. The trial he would have prepared for based upon the state's misrepresentations would be one that never would be held. Thus, the defendant's role in the adversary process of presenting and evaluating for the trier of facts the relevant evidence would be undermined. To that extent the judicial fact finding process, both because of surprise and the lack of a chance for effective preparation for trial, would be rendered less reliable and the criminal justice system subverted. See Brennan, J., "The

[29]See Nakell, "Criminal Discovery for the Defense and Prosecution: The Developing Constitutional Considerations," 50 N.C.L. Rev. 437 (1972).

Criminal Prosecution: Sporting Event or Quest for Truth?" 1963 Wash.U.L.Q. 279. Other interests of the defendant and the justice system, as the court of appeals found in this case, would be jeopardized. Having been deceived about the strength of the state's case, the defendant would be deprived of the opportunity intelligently to decide whether plea bargaining is in his best interests. Whether or not access to plea bargaining is constitutionally required, a procedure which defeats the opportunity to resort to it disserves "the ends of justice." *Williams v. Florida*, 399 U.S. 78, 106 (1970) (Burger, C.J., concurring).

This Court has held that because a criminal trial "is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played," *Williams v. Florida, supra*, 399 U.S. at 82,[30] that a Florida statute requiring a defendant to give notice to the prosecution of his alibi defense prior to trial was constitutional. "We find ample room in that system, at least as far as 'due process' is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." *Ibid.* If the search for truth is enhanced by protecting the prosecution from undue surprise, by the same token the search for truth should be equally enhanced by protecting the defendant from undue surprise and not depriving him of the opportunity to meet the facts and issues in the state's case.

[30]Commentators have also observed that "the day has long since passed when a case is to be tried from ambush." Kaufman, "Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts," 57 Colum. L. Rev. 1113, 1119 (1957).

This case does not present the question of whether the prosecution must save a defendant from surprise by opening its files. The question presented is whether the prosecution is allowed to *manufacture* surprise by lying to a defendant about its evidence, thereby insuring that the defendant will be inadequately prepared at trial.

This Court has long recognized that the prosecution has a duty to deal fairly with persons charged with crime. In a series of cases beginning with *Mooney v. Holohan*, 294 U.S. 103 (1935), it has held that law enforcement officers or the prosecution may not manipulate the trial to the disadvantage of the defendant by knowingly using or failing to correct false evidence or to withhold from a defendant, intentionally or not, and whether requested or not, material exculpatory evidence, including evidence useful only for impeachment of witnesses at trial. *United States v. Agurs*, ____ U.S. ____, 96 S.Ct. 2392 (1976); *Giglio v. United States*, 405 U.S. 150 (1972); *Giles v. Maryland*, 386 U.S. 66 (1967); *Miller v. Pate*, 386 U.S. 1 (1967); *Brady v. Maryland*, 373 U.S. 83 (1963); *Wilde v. Wyoming*, 362 U.S. 607 (1960); *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957); *White v. Ragen*, 324 U.S. 760 (1945); *Pyle v. Kansas*, 317 U.S. 213 (1942). The reason that the prosecution may not use deception and trickery in the presentation of its case, aside from undermining the reliability of the fact finding process of the adversary system and creating barriers to plea bargaining, is that the prosecution "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

In *Brady v. Maryland*, the prosecutor disclosed several statements to the defendant, but not one in which the co-defendant admitted himself to be the trigger man. In concluding that the state's conduct violated due process, the Court said: "Society wins not only when the quilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." 373 U.S. at 87. In *Alcorta v. Texas*, the prosecutor allowed a witness to testify that he and the defendant's wife had not had any dates when the prosecutor knew that they had been lovers. This Court reversed Alcorta's conviction for the reason that the prosecution had allowed the witness to testify falsely, thereby denying the defendant a fair trial.[31] Unfairness in the conduct of trial has not been limited to the *Brady* and *Alcorta* situations involving use of perjured testimony or the suppression of material, exculpatory evidence by the prosecution. Unfairness has been found to result where the prosecution failed to disclose the identity of informers whose testimony was relevant and might be helpful to the accused, *Roviaro v. United States*, 353 U.S. 53 (1957). Unfairness has also been found to be inherent in a state statutory scheme allowing the prosecution to indict for a more serious offense where a defendant has taken a de novo appeal. The denial of

[31] In *Brady* and *Alcorta*, the deception was practiced before and during trial. In this case the deception was abandoned at trial. But the distinction is not significant for a defendant is as much entitled to constitutional protection during preparation for trial as at the trial itself. See *supra*, at 34-7; and *United States v. Wade*, 388 U.S. 218, 231-32 (1967) ("the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification.")

due process was not based upon any defect in the fact finding process arising from the state statutory scheme or doubts as to the defendant's guilt. "The question is whether the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process requires a rule analogous to that of the [*North Carolina v.*] *Pearce* case [395 U.S. 711 (1969)]. We conclude that the answer must be in the affirmative." *Blackledge v. Perry*, 417 U.S. 21, 27 (1974). The opportunity for vindictiveness was also present in the case. A. 92.

This Court has not catalogued all the circumstances in which prosecutorial practice or conduct might deny a defendant a fair trial. But it would be intolerable to conclude, as is urged here, that deliberate and systematic lying by the prosecution as to the evidence it will present at trial, is constitutionally acceptable, or that if the prosecution is not allowed to lie and deceive, it will weaken law enforcement.[32] Cf. *United States v. Nixon*, 418 U.S. 683, 703-16 (1974).

[32]The arguments in the Solicitor General's brief dealing with conduct of trial involving bypass or collateral estoppel, Brief, at 49-52, were never raised in the pleadings or argued by the petitioners at any stage of these proceedings. Being affirmative defenses, and not having been pleaded or argued, they were waived. Rule 8(c), F.R.Civ.P., *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607 n.19 (1975).

III.

THERE WAS NO LEGITIMATE NEED FOR MAINTENANCE OF THE INFORMER'S COVER; BUT IF THERE WERE, THE NEED COULD NOT OVERRIDE RESPONDENT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL.

According to the state, Weatherford had "great value" as an agent and that was why his cover had to be maintained. Brief for the Petitioners, at 12. The record, however, does not support the claim. It is actually impossible to reconstruct what Weatherford did as an informer for SLED, for neither SLED nor Weatherford kept any records of his activities. A. 185-86. The record does disclose that: Weatherford never made a single arrest as an agent for SLED; he testified at only one trial–Bursey's; he was "[i]nclined to say," 'Yes, sir,' " that some of his assignments had led to convictions but he couldn't remember a single case in which that had happened. A. 186. The only intelligence which the record documents that Weatherford furnished SLED involved Bursey. The record discloses other things that Weatherford did as a state law enforcement officer: he vandalized the Administration Building at the University of South Carolina; he participated in a conversation with Bursey and others about a guerrilla theatre skit to celebrate National Anti-Draft Week, which mysteriously escalated into malicious destruction of property; he made no effort to stop the commission of the crime; and, he went to Atlanta, Georgia, and applied for membership in the Venceremos Brigade, ostensibly to go to Cuba. A. 176-77. The state's case for a need for cover is really based upon the conclusory and self-serving generaliza-

tions of law enforcement agents that Weatherford was of "great value" and was working on "other things." What those things were is simply not discoverable in this record.

Strom never seriously argued that there was a real need for Weatherford's cover to be maintained. Although he said initially that there were other "problems" at the University (presumably Bursey), he admitted to the trial judge that Weatherford wasn't working on "anything particular" where he had to maintain his cover. A. 125. Strom also admitted that while he wasn't going to announce in the newspaper that Weatherford was an informer, he wouldn't be shocked if that happened. The reason Strom was not particularly concerned about Weatherford's cover was that he doubted he could be effective as an undercover agent after the arrest. A. 124-125. The state's case for law enforcement need is simply not made out.[33]

The state also argues that Weatherford needed to maintain his cover because "it was felt that the agent's life might be in danger if his identity was known." Brief of Petitioners, at 12. The apprehension was Solicitor Foard's, not Weatherford's. Strom offered protection to Weatherford after he testified but Weatherford turned it down. A. 107.

What is significant about the claimed need for maintenance of Weatherford's cover is that the state itself blew the cover and revealed Weatherford as an

[33]In its amicus brief, the government valiantly tried to shore up the state's case of need to retain Weatherford's cover. But the efforts reflect, again, a lack of familiarity with the record. The Solicitor General says that "Weatherford could not be replaced on short notice." Brief, at 42. The statement is pure speculation. Perhaps there were scores of people anxious to get on the SLED payroll and inform. The state, of course, never argued the point.

agent. Had Weatherford been of such "great value" and the need for law enforcement so acute, or had the informer's life really been in danger, quite simply Weatherford would have been kept underground. The record in this case points irresistibly to the conclusion that the reason Weatherford's cover was maintained was to insure that he would be a devastatingly effective witness at Bursey's trial.

Even if the maintenance of Weatherford's cover in light of the facts of this case is regarded as a legitimate law enforcement need, that does not end the matter. For the state's interest in maintaining an agent's secrecy must give way when it conflicts with a defendant's right to a fair trial. In *Roviaro v. United States*, 353 U.S. 53, 62 (1957), involving the revelation of an informer's identity who had participated in the crime for which Roviaro was charged, this Court said that the "problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." In balancing those interests the Court concluded that the informer's testimony" was highly relevant and might have been helpful to the defense" and found it error for the district court to have refused to compel disclosure of the informer's identity. 353 U.S. at 63-4. The "balancing" in *Roviaro* was thus a limited sort, for the defendant having shown a need for disclosure, the state could never have tipped the scales in favor of secrecy.[34]

[34]*Cf. United States v. Nixon*, 418 U.S. 683, 713 (1974), where the Court concluded that a privilege "based only on the generalized interest in confidentiality . . . cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice."

While this case does not involve whether the state must disclose an informer's identity, it does involve whether the state's interest in maintaining an informer's cover outweighs a defendant's interest in receiving a constitutional trial. It clearly does not. On the facts of this case, moreover, it does not appear that there was actually a "flow of information" to protect. Had there been Weatherford would not have been called as a witness.

Just as the state has no interest in secrecy sufficient to deny a defendant a fair trial through non-disclosure of relevant and needful witnesses, the state could have no interest sufficient to deny a defendant the assistance of counsel. The right to counsel is an absolute precondition to a fair trial and denial of it is *per se* unconstitutional. *Argersinger v. Hamlin*, 407 U.S. 25 (1972),[35] *Glasser v. United States*, 315 U.S. 60 (1942), and *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961).

But even if there were such a doctrine as "justifiable denial of counsel," no justification is even colorably made in this case. Presumably the standard for denial would be whether it promotes a compelling state interest[36] since the rights involved, counsel and a fair trial, are fundamental. *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Estes v. Texas*, 381 U.S. 532 (1965). The state would have to show that its actions serve a compelling state interest and that there is no less

[35] *Argersinger* rejected the notion that insufficient national "legal resources" could justify denial of counsel to indigents charged with petty offenses. 407 U.S. at 37, n.7.

[36] By no means does Bursey concede such a test is applicable, but makes this argument only to show that the strictest test known to constitutional law is not met by the state.

restrictive means to protect this compelling interest. *Shapiro v. Thompson*, 394 U.S. 618 (1969), *Griswold v. Connecticut*, 381 U.S. 479 (1965). The test is not met here.

The intrusion of the informer, "always unpleasant business despite the conceded importance of informers for the administration of criminal justice," *United States v. Huss*, 482 F.2d 38, 41 (2nd Cir. 1973), was completely unwarranted after Bursey's arrest. It was not utilized to investigate an on-going crime. In *Hoffa v. United States*, 385 U.S. 293 (1966), the informer reported an on-going jury tampering attempt. In *Caldwell v. United States*, 205 F.2d 879 (D.C.Cir. 1953), the agent was instructed by the prosecutor to disassociate himself from the defense camp. He got the go-ahead only when he reported a plot to steal the prosecutor's files. Not only was there no ongoing criminal activity present according to Strom for Weatherford to investigate, but there was no general need of law enforcement for him to maintain his cover. Both Strom and Weatherford agreed that disclosure would not have jeopardized SLED's law enforcement mission. Weatherford's role with SLED might have changed following disclosure but not his effectiveness as a law enforcement agent. Had he been rendered ineffective, he obviously would never have been offered permanent employment as a SLED agent. At best, the claim of law enforcement need amounts to law enforcement convenience, and that is not a compelling interest justifying denial of counsel or any other fundamental right. *Griffin v. Illinois*, 351 U.S. 12 (1956), *Argersinger v. Hamlin, supra, Duncan v. Louisiana*, 391 U.S. 145 (1968), *United States v. Nixon, supra.*

The state, where it does have a legitimate need for secrecy, may protect that interest in ways which do not involve either disclosure or denying persons accused of crime the protection of the constitution. If it really values secrecy, it can refuse disclosure and dismiss its action against the defendant. See, *e.g.*, *Portomene v. United States*, 221 F.2d 582 (5th Cir. 1955); *United States v. Conforti*, 200 F.2d 365 (7th Cir. 1952); *Sorrentino v. United States*, 153 F.2d 627 (9th Cir. 1947). In cases other than those involving the identity of informers, the courts have similarly held that the government is free to resist disclosure of secrets. But if it does so, and the information withheld is relevant to the defense, it may not proceed with prosecution. See *Jencks v. United States*, 353 U.S. 657, 671 (1957), quoting from *United States v. Reynolds*, 345 U.S. 1, 12 (1953) ("the rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.").

The Solicitor General says this case establishes a "fail safe" method of revealing the identity of informers, since a person invited into another's defense counsels would decline *only* if he was an informer. Brief, at 11, 21. The hypothesis ignores the variety of human behavior and the multitude of reasons a person might decline such an invitation. Moreover, FBI agents and informers, according to the Solicitor General's brief,[37]

[37]"The standards for the use of intelligence informants are contained in internal FBI directives that are not available to the public." Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities, Book III, p. 229.

are *already* "instructed not to attend [defense planning] sessions." Brief, at 34, n. 23. If the instructions are to be more than gibberish, they obviously mean that agents are to decline invitations to meet with counsel for defendants to discuss defense strategy. How the court of appeals' opinion suddenly formulates a "fail-safe" method for detecting informers in view of this existing practice is inexplicable. In any case, the constitution simply does not allow the prosecution to lie to a defendant and deny him counsel and a fair trial in order to maintain an agent's cover.

IV.

THE COURT OF APPEALS PROPERLY CONCLUDED THAT STROM'S OWN DECISIONS DIRECTLY CAUSED THE DENIAL TO RESPONDENT OF THE EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL.

The court of appeals that Strom (1) participated in the decision to maintain Weatherford's cover; (2) he entrusted the details of perfecting the cover to Solicitor Foard, who was at his office the day of the arrest; and (3) that he concurred personally in the decision to allow Weatherford to testify. Moreover, as the court of appeals noted, "according to appellees' own argument on appeal, contact of the type which occurred in this case and violated Bursey's constitutional rights was absolutely essential to the continued viability of Weatherford as an undercover agent in view of his close relationship with Bursey." A. 262. The state does not dispute the accuracy of these findings, only the legal consequences to be attached to them. Based upon its

findings, the court of appeals held that the district court's finding that "there is no testimony connecting defendant Strom with any . . . acts allegedly committed by Weatherford" was clearly erroneous,[38] and that its legal analysis of Strom's liability was incorrect. *Ibid.*

The state argues that even if Weatherford violated Bursey's consitutional rights, and even if Strom was involved in maintaining Weatherford's cover, as the court of appeals found, that Strom could be liable only if he had "direct knowledge" of Weatherford's intrusions into the defense camp. Brief for Petitioner, at 22. Strom, of course, did know that Weatherford was, as a SLED agent, continuing to investigate Bursey after the arrest and until the trial.[39] A. 10. It is difficult to

[38]The findings of the district court are not, of course, entitled to special deference under this Court's "two court" rule "not to reverse findings of fact concurred in by two lower courts unless shown to be clearly erroneous." *Neil v. Biggers*, 409 U.S. 118, 193 n.3 (1972).

[39]The Solicitor General says in his brief that "the court of appeals concluded that there was no evidence of Strom's direct personal supervision of "Weatherford's undercover activities (A. 258)." Brief, at 60, n.40. That is not what the court of appeals said. What the court of appeals actually said was "there is no evidence of Strom's direct personal supervision of *these machinations*," (emphasis supplied) referring–not to Weatherford's undercover activities–but to the sham defendant and phoney attorney ruses. These "machinations" were arranged by Solicitor Foard, although Strom fully concurred in them. That the court of appeals was making a distinction between "machinations" directly supervised by Solicitor Foard and undercover activities is apparent from the next phrase of the court's opinion: "it is clear from his testimony that he [Strom] expected Weatherford to continue working as an undercover agent on the University of South Carolina campus." A. 258, and see A. 222-23.

believe that he did not also know that Weatherford was participating in defense counsels. It is difficult to believe that when Weatherford visited Strom's office every other week to collect his pay, or when he reported to him on the telephone, that the agent and the chief did not discuss Weatherford's biggest case, the only case in which he was ever to testify as a SLED agent.

Strom's disclaimers are not dispositive, however, for this Court has held than an official is liable for misconduct under §1983 "if he knew or reasonably should have known" that his acts would violate constitutional rights. *Wood v. Strickland*, 420 U.S. 308, 322 (1975). It is impossible to conclude that Strom should not reasonably have known that defense contact would occur. Indeed, the very purpose of the co-defendant and retained attorney deception was to facilitate Weatherford's movement around Bursey.[40] In any case, the court of appeals should be deemed correct in ruling that Strom's personal involvement in the violation of Bursey's rights was satisfied by the decisions and actions which he concededly took, and that "against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961), Strom was liable for the constitutional injury that occurred. A. 263.[41]

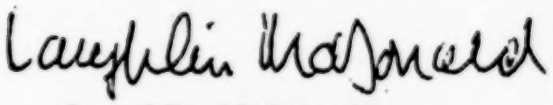
[40]As noted, *supra*, at 66-7, the district court recognized that discussions between Weatherford and Wise about how Taylor was handling his case "was a natural reaction." A. 249.

[41]Although not relied upon by the court of appeals, Strom could be found liable for failing "to take minimal precautions" to insure that his agent would not invade defense counsels or misrepresent the state's case." *Fisher v. Volz*, 496 F.2d 333, 347 (3rd Cir. 1974).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,



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In the Supreme Court of the United States

OCTOBER TERM, 1976

JACK M. WEATHERFORD, ET AL., PETITIONERS

v.

BRETT ALLEN BURSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

	Page
Questions presented	1
Interest of the United States	2
Statement	3
Summary of argument	11
Argument	17
Introduction	17
I. The Sixth Amendment does not establish a *per se* rule forbidding an undercover agent to meet with a defendant's counsel	22
A. The constitutionality of petitioners' conduct must be evaluated by considering the extent to which such conduct may undermine the proper functioning of the adversary system	22
B. There is no reason to erect a prophylactic rule that all overhearings of meetings with counsel violate the Sixth Amendment	32
C. Weatherford's conduct in this case did not jeopardize the defense or inhibit respondent's discussions with his attorney	41
D. If Weatherford's presence at the meeting with counsel did not violate the Sixth Amendment, then neither did his testimony at respondent's trial	46

Argument—Continued Page

1. Weatherford's testimony was not a "fruit" of his attendance at the meetings 46
2. Weatherford's testimony at trial is not an appropriate source of civil liability 49

II. The constitution does not require the prosecution to disclose before trial the identities of undercover agents who will testify 52

Conclusion 61

CITATIONS

Cases:

Anders v. *California*, 386 U.S. 738 23
Argersinger v. *Hamlin*, 407 U.S. 25 ..... 22, 25
Bivens v. *Six Unknown, Named Agents*, 403 U.S. 388 2
Black v. *United States*, 385 U.S. 26 ..... 15, 38, 39, 40
Brady v. *Maryland*, 373 U.S. 83 ..... 10, 52, 53
Brawer v. *Horowitz*, 535 F.2d 830 50
Brooks v. *Tennessee*, 406 U.S. 605 23
Caldwell v. *United States*, 205 F.2d 879 ..... 29, 30
Cardillo v. *Zyla*, 486 F.2d 473 52
Clark v. *United States*, 289 U.S. 1 26
Coleman v. *Alabama*, 399 U.S. 1 23
Coplon v. *United States*, 191 F.2d 749 ..... 29, 30
Doe v. *McMillan*, 412 U.S. 306 50
Douglas v. *California*, 372 U.S. 353 23
Ellis v. *Dyson*, 421 U.S. 426 52

Cases—Continued Page

Estelle v. *Williams*, No. 74-676, decided May 3, 1976 ..... 41, 51
Fisher v. *United States*, No. 74-18, decided April 21, 1976 ..... 12, 23
Gagnon v. *Scarpelli*, 411 U.S. 778 25
Geders v. *United States*, No. 74-5968, decided March 30, 1976 23
Gideon v. *Wainwright*, 372 U.S. 335 22
Glasser v. *United States*, 315 U.S. 60 23
Guerro v. *Mulhearn*, 498 F.2d 1249 51
Herring v. *New York*, 422 U.S. 853 ..... 23, 27
Hilliard v. *Williams*, 516 F.2d 1344, certiorari denied, 423 U.S. 1066 50
Hoffa v. *United States*, 385 U.S. 293 ..... 16, 24, 25, 29, 36, 44, 46, 47
Imbler v. *Pachtman*, 424 U.S. 409 50
Jackman v. *Rosenbaum Co.*, 260 U.S. 22 56
Johnson v. *Avery*, 393 U.S. 483 24
Kirby v. *Illinois*, 406 U.S. 682 23
Lewis v. *United States*, 385 U.S. 206 ..... 19, 36, 40
Lopez v. *United States*, 373 U.S. 427 ..... 36, 39, 40
Martin v. *Merola*, 532 F.2d 191 51
Massiah v. *United States*, 377 U.S. 201 ..... 23, 30
Mastracchio v. *Ricci*, 498 F.2d 1257 52
Middendorf v. *Henry*, No. 75-175, decided March 24, 1976 ..... 25, 27
Miranda v. *Arizona*, 384 U.S. 436 26
O'Brien v. *United States*, 386 U.S. 345 ..... 15, 38, 39, 40
Preiser v. *Rodriguez*, 411 U.S. 475 51
Radzanower v. *Touche Ross & Co.*, No. 75-268, decided June 7, 1976 52
Rizzo v. *Goode*, 423 U.S. 362 60
Ross v. *Moffitt*, 417 U.S. 600 ..... 23, 24, 25

Cases—Continued

	Page
Roviaro v. *United States*, 353 U.S. 53	11, 12, 20, 21, 27
Sachs v. *Stecker*, 60 F.2d 73	50
Scoggin v. *Schrunk*, 522 F.2d 436	52
Sims v. *Adams*, 537 F.2d 829	61
State v. *Tune*, 13 N.J. 203, 98 A.2d 881	55
Stovall v. *Denno*, 388 U.S. 293	23
Taglianetti v. *United States*, 398 F.2d 558	31
Tennessee v. *Dunlap*, No. 75-95, decided June 10, 1976	52
United States v. *Acosta*, 526 F.2d 670	54
United States v. *Agurs*, No. 75-491, decided June 24, 1976	16, 17, 54, 57, 59
United States v. *Ash*, 413 U.S. 300	23, 24
United States v. *Blackburn*, 446 F.2d 1089	26
United States v. *Bolden*, 514 F.2d 1301	56
United States v. *Brown*, 484 F.2d 418, certiorari denied, 415 U.S. 960	35
United States v. *Cannone*, 528 F.2d 296	55, 56
United States v. *Chemical Foundation, Inc.*, 272 U.S. 1	38
United States v. *Conder*, 423 F.2d 904, certiorari denied *sub nom. Pegram* v. *United States*, 400 U.S. 958	55
United States v. *Crow Dog*, 532 F.2d 1182, certiorari pending, No. 75-1843	34
United States v. *Gartner*, 518 F.2d 633	25, 29, 34
United States v. *Harflinger*, 436 F.2d 928, certiorari denied, 402 U.S. 973	56
United States v. *Jordan*, 466 F.2d 99	56
United States v. *Lusterino*, 450 F.2d 572	35

Cases—Continued

	Page
United States v. *MacCollom*, No. 74-1487, decided June 10, 1976	25
United States v. *Marion*, 404 U.S. 307	44
United States v. *Massingale*, 500 F.2d 1224	56
United States v. *McCord*, 509 F.2d 334, certiorari denied, 421 U.S. 930	35
United States v. *Miller*, No. 74-1179, decided April 21, 1976	36
United States v. *Miller*, 529 F.2d 1125	54
United States v. *Murphy*, 480 F.2d 256, certiorari denied, 414 U.S. 912	56
United States v. *Nakaladski*, 481 F.2d 289, certiorari denied *sub nom. Coco* v. *United States*, 414 U.S. 1064	56
United States v. *Nobles*, 422 U.S. 225	31
United States v. *Park*, 421 U.S. 658	61
United States v. *Payseur*, 501 F.2d 966	56
United States v. *Rispo*, 460 F.2d 965	35
United States v. *Rosenberg*, 146 F. Supp. 555, reversed, 245 F.2d 870	25-26
United States v. *Rosner*, 485 F.2d 1213, certiorari denied, 417 U.S. 950	25, 29-30
United States v. *Russell*, 411 U.S. 423	20
United States v. *Scott*, 521 F.2d 1188, certiorari denied, No. 75-5799, March 8, 1976	34-35
United States v. *Valencia*, C.A. 6, No. 75-1342, decided September 2, 1976	35
United States v. *Verse*, 490 F.2d 280, certiorari denied, 416 U.S. 989	56
United States v. *Wade*, 388 U.S. 218	23
United States v. *Werker*, 535 F.2d 198	58

Cases—Continued Page

United States v. *White*, 450 F.2d 264 56
United States v. *White*, 401 U.S. 745 ..... 15, 36, 37, 39
Wardius v. *Oregon*, 412 U.S. 470 ..... 17, 57
White v. *Maryland*, 373 U.S. 59 23
Wood v. *Strickland*, 420 U.S. 308 ..... 11, 37

Constitution and statute:

United States Constitution:

First Amendment 18
Fourth Amendment 15
Fifth Amendment 52
Sixth Amendment ..... *passim*
Fourteenth Amendment 2, 9, 52

18 U.S.C. (Supp. V), pp. 1318-1319 55
42 U.S.C. 1983 ..... 2, 51, 60

Miscellaneous:

Cardozo, *The Nature of the Judicial Process* (1921) 24
Federal Rules of Criminal Procedure:

Rule 11(e) 58
Rule 16 16

Harper and James, *The Law of Torts* (1956) 50
Holmes, *Privilege, Malice, and Intent*, 8 Harv. L. Rev. 1 (1894) 37
McCormick, *Evidence* (2d ed. 1972) 31
VIII Wigmore, *Evidence* (McNaughton rev. 1961) 26, 31
Wright, *Federal Practice and Procedure: Criminal* (1969) 54

In the Supreme Court of the United States

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BRETT ALLEN BURSEY

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

The United States will discuss the following questions: [1]

1. Whether the presence of an undercover agent during a defendant's conversation with his counsel, without more, violates the defendant's right to the assistance of counsel.

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[1] We briefly discuss at note 40, *infra*, the third question presented by the petition.

2. Whether due process of law requires that the existence of an undercover agent be disclosed to the defense in advance of trial.

INTEREST OF THE UNITED STATES

This is an action for damages against an undercover agent and the chief of the state law enforcement agency for which he worked. Although the claims here are founded on the Fourteenth Amendment and 42 U.S.C. 1983, which apply only to the States and persons acting under color of state law, damages actions against federal officers may, in some circumstances, be based upon other provisions of the Constitution. *Bivens* v. *Six Unknown, Named Agents*, 403 U.S. 388. The Court's disposition of this case therefore may affect the personal liability of officers and employees of the United States.

Perhaps even more important, the decision in this case will elucidate the constitutional norms governing the conduct of law enforcement investigative efforts whenever undercover agents or confidential informants are employed, and the need to preserve their "cover" comes into potential conflict with the confidentiality of defense planning in a criminal case. The federal government uses undercover agents, especially in investigations of narcotics and terrorist activities, and the Court's decision will affect the conduct of such operations.

Finally, federal prosecutors are not generally aware of any due process obligation to make pretrial

disclosure of damaging evidence in their possession. The court of appeals' ruling on this aspect of the case, if upheld, would radically transform the nature of federal criminal prosecutions. This case thus is likely to have a substantial impact upon the administration of the criminal justice system, giving the United States a pressing interest in the resolution of the questions presented.

STATEMENT

1. After a jury trial in the Richland County Court of General Sessions of the State of South Carolina, respondent was convicted of causing the malicious destruction of county property (A. 245, 250-251). Respondent took part in the vandalism of the Richland County Selective Service office in Columbia, South Carolina, by spraying and splattering red paint on the outside and inside of the building and throwing a brick and note through a window. The next morning, respondent and petitioner Jack M. Weatherford were arrested as participants in the vandalism. Two other participants in the incident, as well as other aiders and abettors, were not arrested (A. 241). Weatherford was in fact an agent of the South Carolina State Law Enforcement Division, and he testified against respondent at the latter's trial. Respondent, who took the stand and admitted his part in the events (A. 250), was sentenced to 18 months' imprisonment. He did not appeal or seek collateral relief. After fleeing the State and remaining a fugitive for more

than two years, respondent was captured and served his sentence (A. 52, 250-251).

2. Three years after being convicted, respondent began this suit for money damages against Weatherford and against petitioner Pete Strom, Chief of the South Carolina State Law Enforcement Division, and other, unknown state agents (A. 3-6). The complaint alleged that Strom, Weatherford, and others deliberately infiltrated the defense camp for the purpose of becoming privy to defense communications, that Weatherford learned "contemplated defense strategies, pertaining both to factual and legal theories of defense," and that Weatherford reported to Strom or others, "who in turn communicated information pertaining to [respondent's] defense strategies to * * * the State's prosecuting attorney" in the criminal trial (A. 5).

Petitioners' motion for summary judgment was denied (A. 12-20), and a nonjury trial was held. The facts do not appear to have been subject to serious dispute. Following the draft board incident, Strom and Solicitor John Foard, who was to be the prosecutor at respondent's trial, decided that conditions on the campus of the University of South Carolina were explosive because of the reaction to the war in Southeast Asia, and that it would be advantageous for Weatherford (the State's only undercover agent on campus) to maintain his guise and continue his work (A. 105, 118). Weatherford's usefulness depended

on concealing his status.[2] As part of the plan of concealment, Weatherford was indicted for the draft board vandalism and provided with an attorney. Weatherford told respondent, who had retained separate counsel, that they would be tried separately (A. 84, 131, 155, 172-173, 248-249). Strom and others expected that Weatherford would not testify (A. 106, 210-219), although it was understood that there might be a change in that plan (A. 128, 176).[3] He did not testify at respondent's preliminary hearing.

Weatherford never sought to take part in meetings between respondent and his counsel (A. 67, 96, 248). Because it was necessary to maintain his cover, however, Weatherford cooperated in two meetings ini-

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[2] There also was thought to be some danger to Weatherford's life if his status were revealed, for he had participated in many other investigations involving potentially dangerous people (A. 130, 132; but cf. A. 107).

[3] The district court concluded that, until the date of the criminal trial, the prosecutor "intended to use as the primary witness for identification of [respondent] and his participation in the crime one William Burt Finney, III, * * * who * * * had written out for [respondent] the note which was attached to the brick found inside the Selective Service Office" (A. 249-250). The prosecutor testified that he learned of the damage to the draft board the morning after the incident, but that he had not spoken to Weatherford about it, although he knew Weatherford had participated (A. 128). By the time of trial, however, Weatherford's cover was believed lost through other events (A. 250). Not until the jury had been sworn on the morning of respondent's trial did the prosecutor decide to use Weatherford (A. 131). The prosecutor then did not know that Weatherford had met with respondent's attorney (A. 10, 131).

tiated by respondent (A. 97). Respondent arranged these meetings so that his attorney, C. Rauch Wise, who had expressed a desire to meet with all those involved in the case, could meet with Weatherford (A. 34-35).

The first meeting took place at respondent's house; Weatherford testified that when he accepted respondent's invitation, he did not know that respondent's attorney would be present, and that he considered the meeting coincidental (A. 182-183).[4] As Wise described the meeting (A. 81): "It was a case of my asking him questions and he answering, also not only about the case, but * * * about his personal background and so forth, along that line." There was no discussion of defense witnesses, because "we hadn't gotten into the case enough to decide precisely along [w]hat lines we would proceed" (*ibid.*). Wise testified that defense strategy was discussed only to the extent that "we all agreed there was an informant, and [Merrick, the third person present during the draft board incident] was mentioned as being a good probability, due to the fact that he hadn't been arrested and had fled the State and nobody had seen him since the incident" (A. 80). The meeting, then, apparently was devoted primarily to Wise's interrogation of Weatherford as a potential witness (A. 252).

[4] Respondent testified that Weatherford knew in advance that respondent's attorney would be present (A. 65); the district court did not resolve this conflict in the testimony.

Wise suggested that another meeting would be helpful. He and respondent went to see Weatherford at the house of a mutual friend. Weatherford, who did not know in advance about the visit, arrived later (A. 81-82). During this meeting Weatherford, Wise and respondent again discussed the possible existence of an informant. Wise testified that Weatherford denied being an informant and vouched that he would not testify for the prosecution (A. 82-83); the district court concluded, however, that Weatherford was never asked if he were an informant and did not deny being one (A. 249). Wise expressed the view that the defense would be bolstered if no eyewitnesses testified (A. 82-83).

Wise testified that Weatherford may have learned two items of "defense tactics" during the meetings: that while the defense suspected the existence of an informant, they did not know that Weatherford was the informant; and that the defense believed its case would be stronger if the prosecution did not present eyewitness testimony (A. 97-98). Wise agreed on cross-examination that the fact that Weatherford was an undercover agent "had no effect [on the defense] that would not have been present had he not been an undercover agent" (A. 93).

Weatherford's belief that he could not maintain his cover if he were to avoid meetings proposed by respondent was confirmed by respondent himself, who testified (A. 69) that if Weatherford had declined to meet with him, "it would be a chain of events that

ultimately he [Weatherford] would have been caught up in."

Just as he did not tell respondent or Wise that he was an agent, so Weatherford did not disclose prior to respondent's trial any information exchanged during the meetings with Wise—or even the fact that they took place—to Strom, Solicitor Foard, or any other state official (A. 10-11, 104-105, 109, 130-131, 155, 158, 166, 249). If it had been possible to do so, Weatherford would have continued his undercover role and not testified at respondent's trial. Shortly before the trial, however, Weatherford was seen and recognized in the company of state officers (A. 250, 258 and n. 2), and state officials decided that his further usefulness as an undercover agent was jeopardized. Thus, on the morning of trial, Solicitor Foard decided to call Weatherford as a witness. Weatherford's testimony at the criminal trial (A. 225-240) revealed the story of his undercover work up to and including the vandalism of the draft board. The testimony did not refer to his meetings with respondent or his counsel. Respondent made no objection to the propriety of Weatherford testifying or to the admissibility of any of his testimony.

The district court found that Weatherford did not initiate the meetings in question, did not seek information from respondent or his counsel, and did not pass any information about the meetings to any officer of the State (A. 248-249). The court wrote that the meetings represented an attempt by Wise and respondent to obtain information from Weatherford (A. 252), rather than an attempt by Weatherford to intrude. The court also found that state officials, until the very morning of trial, had intended to present their case without Weatherford's testimony rather than "run the risk of revealing him as an undercover agent, due to other matters Weatherford was investigating" (A. 250).

The court concluded that "[n]othing was done by Weatherford, * * * Strom, any [other] agents, the prosecutor or Weatherford's attorney to attempt to obtain information about [respondent], his attorney or his defense plan" (A. 252); it also concluded that because information about defense plans had not been relayed by Weatherford to other officials, Weatherford's presence when defense matters were discussed "did not in any way interfere with [respondent's] right to assistance of counsel or right to a fair trial" (A. 251). Finally, the court held that Strom was not liable because, even assuming *arguendo* that Weatherford had violated respondent's constitutional rights, "there is no testimony connecting defendant Strom with any of such acts allegedly committed by Weatherford" (A. 266).

3. The court of appeals reversed (528 F.2d 483; A. 256-264). It held, first, that Weatherford's meetings with respondent and Wise violated the Sixth and Fourteenth Amendments (A. 260-261). It wrote (A. 260): "whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to" constitute a violation of the Sixth

Amendment. The court apparently constructed a *per se* rule against such meetings, concluding (A. 260): "That the intrusion [into the attorney-client relationship] was not for the purpose of obtaining information but was to maintain Weatherford's cover is, we think, of no consequence." Nor did the court think it relevant that the meetings did not prejudice the defense, writing (A. 261): "In the context of a civil suit, our holding that [respondent's] sixth amendment right to counsel was violated sustains his suit irrespective of any showing of substantial prejudice to his defense."

The court also held that state officers had denied respondent a fair trial by "countenancing" (A. 261) Weatherford's activities. Referring to *Brady* v. *Maryland*, 373 U.S. 83, it concluded that the government could not "conceal the identity of an informant from a defendant during his trial preparation" (A. 261) or allow the informant to "deny up through the day before his appearance at trial that he will testify against the defendant, * * * then testify with devastating effect" (A. 262). The court thought that the prosecutor's decision not to disclose Weatherford's status as an agent until the beginning of trial lulled respondent "into a false sense of security" (A. 262) and deprived him of "the opportunity (1) to consider whether plea bargaining might be the best course, (2) to do a background check on Weatherford for purposes of cross-examination, and (3) to attempt to counter the devastating impact of eyewitness identification" (*ibid.*).

Finally, the court held that Strom might also be liable to pay damages because his "own decisions" (A. 263) relating to the concealment of Weatherford's identity "directly caused the violation of [respondent's] constitutional rights, and that is a separate basis for liability" (*ibid.*). The court remanded for further proceedings at which petitioners would be allowed to present a "good faith" defense pursuant to *Wood* v. *Strickland*, 420 U.S. 308 (A. 263-264).

SUMMARY OF ARGUMENT

Undercover agents and informants are a necessary, if unpleasant, part of the enterprise of detecting and punishing crimes. Their usefulness (and often their safety) depends upon secrecy, however; once an agent's status is known, he must move on to other things. The Court therefore has recognized that there is a legitimate interest in preserving an agent's "cover" as long as possible, consistent with the rights of defendants. *Roviaro* v. *United States*, 353 U.S. 53. The error of the court of appeals in this case stems from its failure to appreciate this interest and from its simultaneous failure to assess the facts of this case in light of the policies served by the Sixth Amendment's guarantee of the assistance of counsel in criminal cases.

The court of appeals has provided defendants with a fail-safe method of detecting informants. Any defendant could invite one suspected of being an informant to a meeting with counsel. If the invited

individual refused to attend, his status as an informant would be confirmed; if he attended, he would be required to answer in damages, and the defendant might well escape conviction for his crime. We submit that the Constitution does not require such a result.

I

We have no doubt that the Sixth Amendment, which protects many features of our adversary system of criminal justice, establishes at least a qualified right for a defendant to have confidential discussions with his counsel. The ability to keep trial preparations secret from the prosecution is an important attribute of the adversary system. Confidence is necessary else "the client would be reluctant to confide to his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher* v. *United States*, No. 74-18, decided April 21, 1976, slip op. 11.

But the right to counsel does not require confidence or absolute secrecy of trial preparation under all circumstances. For example, even the attorney-client privilege does not apply to conversations held in the presence of unrelated third parties, nor does it shield discussions of future crimes or discussions unrelated to legal matters. Moreover, as *Roviaro* plainly illustrates, cases such as this require consideration of legitimate and important countervailing societal interests that may be imperiled by an absolutist approach. The rules governing these cases must be formulated with reference to the policies that the Sixth

Amendment right to counsel, which is being invoked to condemn petitioners' actions, is designed to serve. In our view, the primary purpose of that right is the preservation of the fair and efficient functioning of the adversary system of criminal justice, and the governing rules in cases like this properly depend, therefore, upon an assessment of the actual or potential effect of the challenged actions upon the adversary system.

Applying these principles, we believe it is not difficult to draw a rational line between improper intrusions into confidential defense planning and strategy, on the one hand, and conduct that is permissible even though entailing some contact between a government informant or agent and the defense, on the other. Thus, a defendant's constitutional rights (either to the assistance of counsel or perhaps, more logically, to due process of law) are infringed when the government insinuates an undercover operative into the defense camp for the purpose of securing information to aid the prosecution in the preparation or conduct of a criminal trial or, similarly, when surreptitious eavesdropping on communications between a defendant and his lawyer is undertaken. Even when there has been no deliberate campaign of intrusion, the utilization by the prosecutor in connection with a criminal trial of confidential defense strategy information that has come into his possession would ordinarily raise serious questions.

But where there has been neither an attempt to intrude nor an improper utilization of confidential

information, there is little threat to the fair functioning of the adversary system, and thus little need to enforce an absolute prohibition under the Sixth Amendment. Passive "intrusions" justified by considerations such as an informant's need to protect his cover should be tolerated so long as they produce no unfair advantage to the prosecution at the trial and do not jeopardize a defendant's ability to present any legitimate defense he may have. The distinction we suggest will protect a defendant against the types of government deceit and use of confidential information that have the greatest potential to undermine legitimate strategy or to inhibit a defendant's communication with counsel.

To be sure, it may be difficult in particular cases for courts to distinguish between prohibited intentional intrusions and permitted "passive" involvement. Whatever difficulties may exist do not appear sufficient, however, to call for the establishment of a prophylactic rule that would outlaw all participation by informants and agents in meetings between defendants and their lawyers. Such a rule would bear too high a price, because it would entirely sacrifice one legitimate endeavor (the use of undercover agents investigating ongoing activities) to another.

We submit that it is not unfair to require a defendant to bear part of the risk that those in whom he places trust may turn out to be agents or informants. A defendant can alleviate almost all of this concern by not inviting third parties to sensitive discussions. True, there may be times when the defense perceives

a need to invite third parties to legal discussions, but we submit that, at least in the absence of a governmental purpose to intrude or to capitalize on information learned during such discussions, if a defendant "has no doubts, or allays them, or risks what doubt he has, the risk is his." *United States* v. *White*, 401 U.S. 745, 752. In this respect the case is similar to Fourth Amendment cases in which the Court has held that the Constitution does not protect a person against the risk that his confidence in someone else may be misplaced.

The court of appeals thought that *Black* v. *United States*, 385 U.S. 26, and *O'Brien* v. *United States*, 386 U.S. 345, "read together, establish * * * a *per se* rule" (A. 260) that any participation in discussions with defense counsel is forbidden by the Sixth Amendment. Both *Black* and *O'Brien*, however, concern electronic surveillance, an intruding third ear of which the defendant and his lawyer were wholly unaware; neither involves a misplaced confidence problem. Moreover, both *Black* and *O'Brien* dealt with situations in which the trial had been completed before the illegal surveillance was discovered; here, by contrast, respondent and his attorney knew that Weatherford had attended two meetings with them, and counsel's cross-examination of Weatherford could proceed accordingly. *Black* and *O'Brien* therefore do not support the court of appeals.

The fact that Weatherford testified at respondent's criminal trial after participating in the meetings does not affect our analysis. The violation of

the Sixth Amendment occurred, if at all, either when Weatherford attended the meetings or when the prosecution capitalized on information Weatherford learned. We have argued that Weatherford's attendance in order to protect his cover did not violate the Constitution, and the district court found that he did not convey any information to the prosecutor or capitalize upon it in his testimony. See *Hoffa* v. *United States*, 385 U.S. 293, 307-309.

II

The State did not deny respondent a fair trial by withholding notice of Weatherford's status until he testified at trial. Weatherford's testimony and identity were not exculpatory evidence; indeed, it was precisely because of their damning effect that the court of appeals required advance notification. But there is no requirement that the prosecution notify the defense, in advance of trial, of its most potent evidence. "[I]t has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge." *United States* v. *Agurs*, No. 75-491, decided June 24, 1976, slip op. 14 n. 20.

Discovery in criminal cases is a recent development. As late as 1944, when Fed. R. Crim. P. 16 was first promulgated, there was none in the federal courts. The long acceptance of criminal practice without pretrial discovery suggests that the Due Process Clause does not compel the prosecution to

surrender to the defense its best evidence; only three years ago the Court wrote that the "Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded" (*Wardius* v. *Oregon*, 412 U.S. 470, 474), and nothing has happened since then to call for a different rule.

The government's constitutional duty to disclose extends no further than the duty to disclose material exculpatory evidence known to the prosecutor. See generally *United States* v. *Agurs*, *supra*. Important considerations, including preservation of the traditional adversary system, prevention of manufactured evidence, and forestalling threats to or subornation of potential witnesses, weigh against a system of pretrial disclosure of the prosecution's case. The only harm to petitioner here was caused by his surprise at the turn of events when Weatherford was offered as a witness. The usual remedy for genuine surprise is a continuance. Respondent's counsel did not request a continuance, however, and respondent cannot now complain that his trial was fundamentally unfair.

ARGUMENT

INTRODUCTION

It is perhaps useful to observe at the outset that this case does not present any question whether this use by state law enforcement officers of an undercover agent to monitor activities on the campus was a proper law enforcement activity under the circum-

stances or was an unjustifiable invasion of the First Amendment rights of respondent and others. Evidence introduced by petitioners indicated that the State used Weatherford as an undercover agent to help it prevent, detect, and punish crimes of violence during a time of great turmoil on the Nation's college campuses.[5] Respondent may well contend that the true motive behind Weatherford's undercover activities was to impede or stifle the legitimate expression of controversial views. However, respondent's complaint (A. 3-6) did not allege that Weatherford's activities violated his First Amendment rights or that the undercover use of Weatherford was illegal, except insofar as Weatherford participated in the two meetings with respondent's counsel and testified at trial, and insofar as both petitioners failed to disclose Weatherford's true status in advance of trial.

Accordingly, there was no occasion for the district court to consider the propriety of the State's undercover investigations, and it properly made no findings on the subject. Nor does the court of appeals' opinion indicate that its decision depends in any way upon conclusions regarding the legitimacy of the undercover investigation in a particular case; rather, the principles it announced would apply to all such investigations.

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[5] Weatherford detected and reported plans to make and use Molotov cocktails, and he testified that respondent acquired and kept weapons (A. 241, 227-229). Solicitor Foard testified that there was some concern that Weatherford's life might be in danger once his status as an agent became known (A. 130, 132).

Thus, we need not and do not, in presenting our arguments in this case, express either approval or disapproval of the State's purposes and methods in pursuing undercover investigations through the use of petitioner Weatherford (a matter on which no adequate record has been developed). While under our analysis the reasonableness of a decision that an agent's undercover status should be maintained may be relevant to the legitimacy of his continued contacts with a criminal defendant (see pages 20-22, 27-31, *infra*), the issues before this Court concern general standards of conduct in connection with the activities of undercover agents engaged in investigations whose legitimacy is not questioned. Thus, the way the Court resolves the questions here will likely determine whether, and to what extent, law enforcement officers can continue to make use of undercover agents after the first arrest for a crime about which they may have knowledge.

Undercover agents are a necessary, if unpleasant, part of the enterprise of detecting and punishing crimes. "Indeed, it has long been acknowledged by the decisions of this Court, see *Grimm* v. *United States*, 156 U.S. 604, 610 (1895), and *Andrews* v. *United States*, 162 U.S. 420, 423 (1896), that, in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identities of its agents." *Lewis* v. *United States*, 385 U.S. 206, 208-209, footnotes omitted. Without the use of informants and undercover agents the government would be unable to prosecute many crimes;

others, especially those such as narcotics offenses, in which the victims cooperate in or facilitate the crime, would not even be detected. See *United States* v. *Russell*, 411 U.S. 423, 433.

The informant and the undercover agent therefore are important parts of the arsenal of weapons against crime. But their usefulness depends upon secrecy; once an informant or agent has testified or revealed his status, he must move on to other things. If law enforcement officers regularly revealed the identity of an informant or agent as soon as he had acquired information about a single crime or offender, the utility of such an informant or agent would be severely diminished. This Court therefore has recognized that there is a legitimate interest in maintaining an informant's or undercover agent's "cover" as long as possible, consistent with the rights of defendants. *Roviaro* v. *United States*, 353 U.S. 53. Sometimes secrecy may be maintained indefinitely, even through the criminal trial of one with whom the informant or agent has been associated. Sometimes the informant's identity must be revealed at trial, as in *Roviaro*. Here, as elsewhere when fundamental interests are involved, there is no easy solution, and "no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information [about crime] against the individual's right to prepare his defense." *Roviaro, supra*, 353 U.S. at 62.

In *Roviaro* the public interest "in protecting the flow of information" about crime clashed with the

defendant's ability to call witnesses at trial and to present potentially relevant information to the jury. In this case the public interest "in protecting the flow of information" about crime may conflict with the defendant's right to have the assistance of counsel for his defense. Here, perhaps even more than in *Roviaro*, "no fixed rule" that the informant's identity must be disclosed is desirable. Yet the court of appeals has fashioned just such a "fixed rule" by holding that the Constitution requires informants and undercover agents never to meet with defendants or their counsel, even at the expense of revealing their status, and that the Constitution requires the undercover agent's status as an agent to be disclosed before trial.

Roviaro held that secrecy of an informant's status could often be maintained, recognizing, moreover, that secrecy (at least until the time of trial) is desirable. The court of appeals appears to have assumed that secrecy after the date of a suspect's arrest is undesirable. The rule formulated by the court of appeals gives defendants a fail-safe device to detect informants or undercover agents: any defendant could simply invite one suspected of being an informant or agent to a meeting with counsel. If the invited individual refused to attend, his status as an agent would be confirmed; if he attended, he would be required to answer in damages, and the defendant might well escape conviction for his crime. According to the court of appeals, an undercover agent approached by a defendant or his counsel (or even sur-

prised by them at the house of an acquaintence) must either disclose his status on the spot or quickly turn and walk away before the attorney can ask him any questions; to do anything else would risk exposure to damages and jeopardize the State's ability to prosecute for the crime. We submit that nothing in the Constitution requires this unreasonable result.

The values that may come into conflict when an informant or agent meets with a defendant's attorney are weighty, and the clash between them requires sensitive tools for its resolution. The court of appeals has used a blunt instrument where a scalpel was required. We believe that the resolution of the questions presented here calls for a more detailed analysis of the interests at stake.

I

THE SIXTH AMENDMENT DOES NOT ESTABLISH A *PER SE* RULE FORBIDDING AN UNDERCOVER AGENT TO MEET WITH A DEFENDANT'S COUNSEL

A. The Constitutionality of Petitioners' Conduct Must Be Evaluated by Considering the Extent to Which Such Conduct May Undermine the Proper Functioning of the Adversary System

1. The Sixth Amendment's guarantee of counsel comprises a multitude of rights for a defendant in a criminal case. The Amendment establishes the defendant's right to have counsel even if he is impoverished,[6] the right to have counsel present during

[6] *Gideon* v. *Wainwright*, 372 U.S. 335; *Argersinger* v. *Hamlin*, 407 U.S. 25.

critical stages of the case,[7] and the right to have counsel perform the traditional functions of an advocate,[8] including meeting with his client,[9] planning the defense,[10] presenting evidence and arguments,[11] and marshalling the case on appeal.[12] It establishes, in short, a constitutional right to present a reasonably effective defense.

We therefore have no doubt that the Sixth Amendment establishes at least a qualified right to have confidential discussions with counsel. While confidentiality of attorney-client discussions usually is protected by the common law attorney-client privilege, that objective also has some constitutional dimensions; otherwise "the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher* v. *United States*, No. 74-18, decided April 21, 1976, slip op. 11. The Sixth Amendment also establishes a right for the defendant and his attorney to protect their con-

[7] *United States* v. *Wade*, 388 U.S. 218; *Stovall* v. *Denno*, 388 U.S. 293; *White* v. *Maryland*, 373 U.S. 59; *Massiah* v. *United States*, 377 U.S. 201; *Coleman* v. *Alabama*, 399 U.S. 1. But cf. *United States* v. *Ash*, 413 U.S. 300; *Kirby* v. *Illinois*, 406 U.S. 682.

[8] See *Glasser* v. *United States*, 315 U.S. 60.

[9] See, *e.g.*, *Geders* v. *United States*, No. 74-5968, decided March 30, 1976.

[10] See *Brooks* v. *Tennessee*, 406 U.S. 605, 612-613.

[11] See, *e.g.*, *Herring* v. *New York*, 422 U.S. 853, 857-858.

[12] *Douglas* v. *California*, 372 U.S. 353; *Anders* v. *California*, 386 U.S. 738; but cf. *Ross* v. *Moffitt*, 417 U.S. 600.

fidences from the prosecutor, their opponent in the adversarial system. We conceded as much in our brief in *Hoffa* v. *United States*, 385 U.S. 293,[13] and the Court assumed *arguendo* that it is so (385 U.S. at 307).

The court of appeals thought that this is the end of this case. It is not. It is only the beginning. It is necessary to define the dimensions of the right and to consider its interplay with other important societal interests. Although it may be tempting to declare that there is an absolute "right to confidence," such a declaration would bear too high a price. Rights may have a tendency to declare themselves absolute to the limit of their logic (cf. Cardozo, *The Nature of the Judicial Process* 51 (1921)), but they rarely can be absolute in practice. This is true of the right to the assistance of counsel, as it is of other rights.

For example, there is no right to counsel at every stage of the criminal process;[14] there is no right to the best possible counsel; there is no right to counsel

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[13] We stated (Br. 71) that the Sixth Amendment is violated "if the government places an informant in the defense camp during a criminal trial and receives from that informant privileged information pertaining to the defense of the criminal charges. That is true, we believe, because the Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusions by the government, his adversary in the criminal proceeding."

[14] *United States* v. *Ash*, *supra*; *Ross* v. *Moffitt*, *supra*. Cf. *Johnson* v. *Avery*, 393 U.S. 483, 487-488.

when imprisonment is not involved;[15] and a defendant does not have a right to a particular legal service simply because he thinks it might be useful.[16] Most pertinent here, there is no right to perfect confidence in meetings with counsel, especially those to which third parties are invited. The Court held in *Hoffa* that the Sixth Amendment did not preclude an informant from testifying after being present during conversations between a defendant and his attorneys.[17] The Court found that the intrusion had not been used by the prosecution to learn or benefit from confidential communications and consequently that there had been no wrong done to the defendant by the employment of tainted "fruit." Similarly, courts regularly have held that a defendant who attends strategy sessions with other defendants, and later decides to cooperate with the prosecution, can testify about the crime itself despite a claim that he has overheard confidential discussions.[18]

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[15] *Argersinger* v. *Hamlin*, *supra*; cf. *Middendorf* v. *Henry*, No. 74-175, decided March 24, 1976; *Gagnon* v. *Scarpelli*, 411 U.S. 778.

[16] *Ross* v. *Moffitt*, *supra*, 417 U.S. at 616; *United States* v. *MacCollom*, No. 74-1487, decided June 10, 1976.

[17] The testimony in *Hoffa* was given in a trial for a crime (juror bribery) committed during Hoffa's first trial. The Court assumed *arguendo* that the informant could not have testified during the first trial itself, but it held that even if such a bar existed it would not survive in perpetuity.

[18] See, *e.g.*, *United States* v. *Rosner*, 485 F.2d 1213, 1220, 1223-1228 (C.A. 2), certiorari denied, 417 U.S. 950; *United States* v. *Gartner*, 518 F.2d 633, 636 (C.A. 2); *United States* v.

Even the attorney-client privilege is not an absolute shield. It does not forbid disclosure of communications involving the attorney and a third person, so long as the latter is not the agent of either the client or the attorney. 8 Wigmore, *Evidence* § 2311 (McNaughton rev. 1961); *United States* v. *Blackburn*, 446 F.2d 1089, 1091 (C.A. 5). It also does not establish a shield against disclosure of discussions of future crimes, plans for concealment of past crimes, or other discussions unrelated to a proper legal defense. *Clark* v. *United States*, 289 U.S. 1, 15 (*dictum*); 8 Wigmore, *supra*, §§ 2298, 2299.[19]

2. What transpires at a meeting attended by a defendant and his counsel, then, is not forever and inevitably covered by a cloak of secrecy. There are no absolutes here. Rather, the proper rule for assessing the propriety of participation by an undercover informant or agent in meetings at which a defendant and his lawyer are involved in preparation for a forthcoming criminal trial depends upon consideration of the policies underlying the protections afforded by the Sixth Amendment to the trial preparation process.

Rosenberg, 146 F. Supp. 555 (E.D. Pa.), reversed on other grounds, 245 F.2d 870 (C.A. 3). These cases allow the witness to testify about the details of the crime; they do not involve use by the prosecutor of defense confidences.

[19] Cf. *Miranda* v. *Arizona*, 384 U.S. 436, 477-478 (citizens have a duty to report the commission of crimes, and information relating to them is not privileged).

We submit that the Sixth Amendment generally, and its guarantee of assistance of counsel in particular, is designed to ensure the operation of a fair and effective adversary system of criminal justice. As this Court has said: "[T]he right to the assistance of counsel has been understood to mean that there can be no restriction upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process * * *." *Herring* v. *New York*, 422 U.S. 853, 857; cf. *Middendorf* v. *Henry*, No. 75-175, decided March 24, 1976, slip op. 14. Accordingly, in determining whether particular actions infringe the Sixth Amendment right to the assistance of counsel, the Court must ask—as the court of appeals failed to do —whether the actions threaten to undermine the proper functioning of the adversary system.[20] Only when there is a potential for subversion of the adversary system does the possibility of a Sixth Amendment violation arise, and even then the gravity of any danger should, as in *Roviaro*, be weighed against such substantial countervailing interests as may legitimately require consideration.

The present case does not, we submit, cross the threshold of potential constitutional violation, for

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[20] This does not mean that the Sixth Amendment enshrines every feature of the adversary system now commonly used. The Amendment requires only that the system have certain basic adversary characteristics, including freedom from pretrial meddling that unjustifiably undermines the effectiveness of counsel.

there was no plan or purpose by state officials to acquire defense strategy information and thereby facilitate the prosecution's task in the trial of respondent, nor was there any actual acquisition of information about defense strategy that might have aided the prosecution in its contest with the defense. What happened in this case had, as we discuss fully below, neither actual nor potential detrimental effect on the functioning of the adversary system in respondent's criminal trial.

In saying the foregoing, we do not mean to deny that effective representation of a criminal defendant requires substantial freedom from intrusion by the government, the defendant's adversary in the criminal proceedings. The defendant must feel free to exchange ideas and information with his lawyer; and the nature of the adversary system requires that neither side be permitted to gain unfair advantage over the other by secret acquisition of information about the adversary's trial preparation. Accordingly, to the extent that an intrusion upon the confidence of a meeting between a defendant and his attorney unfairly yields knowledge for the prosecution, or insofar as it unjustifiably inhibits communication between defendant and counsel or otherwise impedes the defendant's legitimate preparations for trial, it should not be tolerated.

We can envision several sorts of intolerable intrusions. The first and most serious is an attempt by the prosecution to insinuate an agent into the defense camp for the purpose of learning information vital to the defense, or the prosecution's use of physical

searches or electronic surveillance to the same end. The danger created by this type of intrusion is patent; at the same time there is no countervailing legitimate governmental interest in employing such tactics. The two leading cases characterized by this Court as involving "government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel" (*Hoffa, supra*, 385 U.S. at 306), grew out of episodes of this sort. *Coplon* v. *United States*, 191 F.2d 749 (C.A.D.C.), condemned the surreptitions overhearing of privileged legal discussions, followed by use of that information to the detriment of the defense. *Caldwell* v. *United States*, 205 F.2d 879 (C.A.D.C.), condemned the practice of instructing an agent to inveigle his way into strategy sessions and to report to the prosecution what was said.

In both of these cases, and in others of similar patterns, the government's conduct has been characterized by "offensive interference with the defendant's rights without any justification" other than the acquisition and use of privileged or confidential information. *United States* v. *Gartner*, 518 F.2d 633, 637 (C.A. 2). In these cases some sanction against the governmental conduct is necessary. "The constitutional barrier is raised when it is the Government that unlawfully intrudes on legal strategy conferences, as when it eavesdrops by electronic means * * * or when it 'plants' a spy in the legal conference * * *." *United States* v. *Rosner*, 485 F.2d 1213, 1227 (C.A.

2). The violation of the Sixth Amendment is caused by the "corrupting conduct" (*ibid.*) of the government, conduct engaged in solely to gain unfair advantage over the defendant in the forthcoming criminal trial.[21]

Coplon, *Caldwell*, and similar cases involved a frontal attack by the government on the proper functioning of the adversary system. In those cases there was deliberate, surreptitious acquisition of defense secrets, which were communicated to the prosecution to assist it at trial. There were, moreover, no countervailing interests justifying such behavior (indeed, it would be difficult to imagine such interests in that context). Such conduct can reasonably be found to deprive the defendant of the effective assistance of counsel (or, perhaps more reasonably, to violate due process standards by undermining the fairness of the trial).

There may also be danger in prosecutorial use of defense secrets acquired in less devious ways. It is arguable that any use by the prosecutor, in the course of preparing for and conducting a criminal trial, of

[21] *Massiah* v. *United States*, 377 U.S. 201, provides an interesting counterpoint to the instant case. The government arranged for an informant to meet with Massiah in the absence of his counsel, and Massiah made incriminating statements. The Court held that the use of such statements against Massiah at trial (but not necessarily the meeting itself) violated the Sixth Amendment because it represented an attempt to capitalize upon the absence of counsel without legitimate justification. Moreover, the Court seemingly implied that a meeting with counsel present would not have violated the Constitution.

confidential information about defense strategy should be condemned, no matter how the information was learned.[22] There is no significant legitimate prosecutorial interest in capitalizing upon confidential information about defense tactics, so long as those tactics are themselves legitimate. Use of such information, however acquired, could create a significant risk of interfering with the ability to mount an effective defense. There is a potential for mischief in the "subtle benefits that might consciously or unconsciously accrue to the government in knowing the planned procedure, or even the state of mind of the defendant and his counsel *with respect to the trial*, quite apart from hearing affirmative evidence, or leads to evidence." *Taglianetti* v. *United States*, 398 F.2d 558, 570 (C.A. 1) (emphasis in original), affirmed on other grounds, 394 U.S. 316.

[22] A similar rule applies to information covered by the attorney-client privilege. 8 Wigmore, *supra*, §§ 2327-2329; McCormick, *Evidence* § 93 (2d ed. 1972). There also is an analogy to the work product doctrine, which shields from disclosure information created by the attorney or at the attorney's request and important to effective trial preparation or strategy. The work product doctrine applies in criminal cases and may be so important to the adversary system that it is protected by the Constitution. *United States* v. *Nobles*, 422 U.S. 225, 236-240. As *Nobles* itself indicates, however, trial preparation by the defense is not inevitably immune from disclosure, but may be compelled when appropriate in accordance with the traditional workings of the adversary trial system (*i.e.*, to the extent similar material could be required to be disclosed by the prosecution).

B. There Is No Reason to Erect a Prophylactic Rule That All Overhearings of Meetings With Counsel Violate the Sixth Amendment

1. The dangers we have discussed so far all arise only when there is either (1) governmental action directed at procuring defense strategy information to aid the prosecution at trial or (2) actual acquisition by the prosecution of confidential defense strategy information. Sixth Amendment concerns are activated in such circumstances because of the threat posed to the fair functioning of the adversary system. In this case, the findings of the district court establish that neither of these predicates to a Sixth Amendment violation was present. It remains to ask whether an absolute prohibition should be adopted for prophylactic purposes even though there is evidence of neither purpose to invade nor design to capitalize upon defense secrets. We think not.

Without the use of governmental power to intrude, and without the acquisition of confidential information by the prosecutor, no unfair advantage can accrue to the prosecution, and there ordinarily would be no constitutional violation. A prophylactic rule absolutely prohibiting any participation by a government agent in meetings with defendant and counsel can be justified, if at all, only on the ground that otherwise defendants and their counsel might feel inhibited by the fear that an intrusion would occur and that the prosecution might learn and capitalize upon their private exchanges. If such apprehension were widespread, the adversary system and the ef-

fectiveness of counsel might be eroded to an unacceptable degree. We submit, however, that the possibility of inhibiting attorney-client communications does not support a *per se* rule that excludes any inquiry into the nature or extent of the problem in particular cases.

Much of the potential for inhibition is, after all, within the control of the defendant and his attorney. If they are concerned that a third party may turn out to be an agent or an informant, they have a ready remedy: they can avoid inviting third parties to defense meetings. Also, the attorney can meet with third parties, such as Weatherford, alone. And during any meetings, the defendant and his attorney can ask questions but avoid revealing defense strategy. These approaches are open whenever a co-defendant has separate counsel and will be tried separately, and so it could have been followed here even though Weatherford was also charged with the offense. Weatherford told respondent at the outset that they would not be tried together, and Weatherford and respondent had separate counsel. Respondent was not compelled to admit Weatherford to his strategy sessions or to convey information to him.

We do not claim that the defendant's option to exclude third parties is in every case sufficient to guard against inhibition. Discussions with co-defendants, witnesses, or others are often valuable, and it may be difficult to gather necessary information without revealing some confidences. But important governmental interests, too, are involved. We have discussed

(pages 19-22, *supra*) the importance of using informants and undercover agents and of keeping their identities secret as long as possible. So long as this practice continues, there is always a risk that an agent or informant may be drawn, without knowledge or even against his will, into discussions with a defendant and his attorney. Unless the Court is willing to hold that the agent so invited must promptly disclose his status, there must be some room for such meetings consistent with the Sixth Amendment. So long as the agent does not take the active role or invite himself to defense meetings, and so long as the agent does not disclose defense strategy information to the prosecution or alter his testimony to capitalize upon what he learned, the defense cannot suffer.[23] We submit that defendants, aware of the prospect of such relatively harmless overhearings on rare occasions, would not be so afraid to communicate with their lawyers that their defense would suffer.[24]

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[23] The Federal Bureau of Investigation has taken steps to ensure that federal agents and informants will not unjustifiably overhear defense planning sessions. Agents and informants are instructed not to attend such sessions, if they can be avoided consistently with maintaining the secrecy of their status. They also are instructed that if they are drawn into meetings with counsel, they should not report to their superiors or to a prosecutor what they have heard.

[24] Our submission is supported by the decisions of most courts that have considered the problem. See *United States* v. *Gartner*, *supra*, 518 F.2d at 637; *United States* v. *Crow Dog*, 532 F.2d 1182, 1197-1198 (C.A. 8), petition for a writ of certiorari pending, No. 75-1843; *United States* v. *Scott*, 521 F.2d 1188, 1192 (C.A. 9), certiorari denied, March 8, 1976 (No. 75-5799); *United States* v. *McCord*, 509 F.2d 334, 353 (C.A.D.C.), certiorari denied, 421 U.S. 930; *United States* v. *Brown*, 484 F.2d 418, 424 (C.A. 5), certiorari denied, 415 U.S. 960; *Manuel* v. *Salisbury*, 446 F.2d 453, 456-457 (C.A. 6). Cf. *United States* v. *Valencia*, C.A. 6, No. 75-1342, decided September 2, 1976, slip op. 8 (although we agree with much of the test articulated in this case, we do not agree that the court correctly applied it to exclude evidence as to the attorney, and persons not his clients, who engaged in crimes planned by the attorney).

An informant's or undercover agent's "passive" attempts to protect his disguise may require him to participate in meetings with a defendant, and a rule permitting such participation would compel a defendant to bear some of the risk that his confidence in those whom he invites is misplaced. The Court consistently has held, however, that "the Fourth Amendment [does not protect] a wrongdoer's misplaced

The court of appeals here attempted to draw support from *United States* v. *Rispo*, 460 F.2d 965 (C.A. 3). But *Rispo* declined to "lay down a rigid standard of prejudice *per se*" (*id.* at 977) and reversed a conviction only after finding that "the factual tableau presented here is shocking" (*ibid.*). In *Rispo* the government had permitted an informant to be tried (and, indeed, to be convicted) together with his co-defendants before revealing his identity to the court or jury. The informant's attorney had consulted actively with counsel for the other defendants both before and during trial and had discussed those strategy sessions with the informant (*id.* at 976 n. 22). The court emphasized that the "deception practiced here continued through the entire trial, with the result that the Government foisted the deception upon the trial court" (*id.* at 977). It concluded that this was "a preconceived and intentional plan to disregard legal standards and precedents in criminal prosecutions" (*id.* at 978). See also *United States* v. *Lusterino*, 450 F.2d 572 (C.A. 2) (informant tried with other defendants).

belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa*, *supra*, 385 U.S. at 302. See also *United States* v. *White*, 401 U.S. 745, 751-752; *Lewis* v. *United States*, *supra*; *Lopez* v. *United States*, 373 U.S. 427, 438.[25] A similar principle should apply to Sixth Amendment claims. The government should not be required to shoulder the full responsibility for preserving a defendant's confidences.[26]

The defendant can protect his own confidences, as we have pointed out, by not inviting third parties to defense meetings at which sensitive or confidential matters will be breached. A defendant who invites others to join his council should not be able, by issuing an invitation, to compel an agent to reveal his identity. Indeed, so much seems clear from *Lewis*, in which the Court wrote (385 U.S. at 211) that "[a] government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant." There may be risks in inviting third parties to legal discussions, just as there are risks in inviting third parties to

[25] Cf. *United States* v. *Miller*, No. 74-1179, decided April 21, 1976, slip op. 7-8.

[26] This concern is particularly pressing where the third party is a casual informant rather than a full-time agent. The prosecution, and the government as a whole, has significantly less control over the activities of "informants" than it does over the activities of "agents," and it would be unrealistic to treat these cases as if all of the informant's decisions are inevitably chargeable to the government.

commit crimes, but we submit that, at least in the absence of a governmental purpose to intrude on legal discussions or to capitalize from information learned during an intrusion, if a defendant "has no doubts, or allays them, or risks what doubt he has, the risk is his." *White*, *supra*, 401 U.S. at 752 (plurality opinion).

2. We recognize that at times it may be difficult to determine whether any defense confidences have been passed on to the prosecution by an agent in Weatherford's position or have been used in some indirect way to ease the prosecution's burden. A prophylactic rule automatically condemning the presence of agents or informants at meetings with defendants' counsel without regard to the circumstances would relieve the courts of occasionally difficult problems of decision that will be presented in particular cases, but this is insufficient to justify an absolute prohibition. Decisions turning upon motive, purpose, and intent may be difficult, but they are often made: a defendant's criminal liability may turn upon his intent, as may the size of his taxes and whether he has commited a tort. Cf. *Wood* v. *Strickland*, *supra*. The difficulty in the application of these factors has not prevented their use where they provide the proper dividing line between the prohibited and the permitted. Cf. Holmes, *Privilege, Malice, and Intent*, 8 Harv. L. Rev. 1 (1894). The problems in applying the standards we have advocated are surmountable. Perhaps other cases will reveal difficulties we do not now perceive in making the distinctions we believe

the Constitution requires, but there will be time enough to adopt a prophylactic rule in the future if case-by-case adjudication proves impractical or provides illusory protection for criminal defendants' legitimate interests.[27]

3. Our analysis thus requires a case-by-case scrutiny of claims that official conduct has undermined the defense by invading its confidences, and the action of the government would be condemned only if there were a governmental purpose to invade confidences or prosecutorial capitalization upon knowledge of defense strategy. The court of appeals eschewed such an approach, adopting instead a *per se* rule that informants never can meet with defendants and their attorneys. It wrote that *Black* v. *United States*, 385 U.S. 26, and *O'Brien* v. *United States*, 386 U.S. 345, "read together, establish * * * a *per se* rule" (A. 260) that any participation in discussions with defense counsel is forbidden by the Sixth Amendment. We think that the court of appeals has read *Black* and *O'Brien*—which were decided the same Term as *Hoffa* —for a much broader proposition than they will support.

In both *O'Brien* and *Black* the Solicitor General advised the Court of the government's discovery that federal agents, using electronic devices, had monitored conversations between the defendants and their attorneys during trial preparations. In *Black* the contents of the recorded conversations had been incorporated in memoranda used by the prosecuting attorneys; in *O'Brien* the Solicitor General represented that the monitored conversations had not been communicated to the prosecutor. In both cases the Court, without the benefit of briefs on the merits or oral argument, reversed the judgments and remanded for a new trial. In *Black* the Court explained that "[t]his will give the parties an opportunity to present the relevant evidence and permit the trial judge to decide the questions involved" and would "permit the removal of any doubt as to Black's receiving a fair trial * * *" (385 U.S. at 29).

We believe, with the dissenting Justices in *Black* and *O'Brien*, that justice could have been fully served by a remand to the district court for a hearing into whether the defendants' convictions had been tainted by the overheard information. However that may be, *Black* and *O'Brien* concern only surreptitious electronic surveillance of defense strategy meetings. Neither case suggests that the Sixth Amendment is violated whenever a defendant, misplacing his confidence in an informant, invites him to attend a meeting with counsel. Indeed, *White* and *Lopez* make it clear that there is a fundamental difference between "misplaced confidence" cases and surreptitious overhearings.

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[27] In the absence of evidence to the contrary, the Court should presume that, once it has clarified the obligations of agents and informants, they will undertake their roles faithfully to the requirements of law. *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15.

Black and *O'Brien* involved electronic surveillance; each gave rise to the specter of the "surreptitious [presence of a] third ear" (*United States* v. *White*, 401 U.S. 745, 784 (Harlan, J., dissenting)). In each, "unknown and unwanted intruders * * * furtively listened to [privileged] conversations." *Lewis* v. *United States*, *supra*, 385 U.S. at 212. In each, the defendant and his attorney not only were unaware of the intrusion at the time it took place, but also remained ignorant of the intrusion until long after the criminal trial had been completed. During the *Black* and *O'Brien* trials the defendants and their attorneys lacked the knowledge that would have permitted them to listen to the trial testimony alert for evidence that might have been derived from an intrusion into defense strategy sessions; they could not probe on cross-examination the source of prosecution testimony to find out whether it was derived in part from defense discussions. It may well be that the Court believed that a taint hearing several years later would not be an adequate substitute for the type of scrutiny that takes place before or during the trial.

In the instant case, however, respondent and his attorney knew from the moment Weatherford took the stand that he had participated in the two discussions with counsel; they sat through his testimony with the knowledge of what had been said at the meetings; they could have cross-examined him with an eye toward exposing any effect the defense discussions

might have had on his recollection of the events. Consequently, respondent and his attorney had an opportunity to expose any fruits of the sessions. Their failure to mention to the court that Weatherford had participated in defense discussions, their failure to raise the question on appeal, and their failure collaterally to attack the conviction demonstrate that there was no taint. Accordingly, even if automatic reversal is necessary in the *Black* and *O'Brien* situation, it does not follow that a constitutional violation took place here. Cf. *Estelle* v. *Williams*, No. 74-676, decided May 3, 1976.

C. Weatherford's Conduct in This Case Did Not Jeopardize the Defense or Inhibit Respondent's Discussions With His Attorney

If the rule for which we have argued is correct, then it follows that Weatherford's attendance at the two meetings between respondent and Wise did not violate the Sixth Amendment. Weatherford did not set out to invade any confidences; he did not pass any information to the prosecutor; he did not undermine respondent's defense or inhibit respondent's discussions with his counsel.

Following the arrest of respondent and Weatherford the day after the incident at the draft board, Strom decided to attempt to maintain Weatherford's cover in order to help maintain order at the university (A. 105). Weatherford was the only undercover agent on campus (A. 118). At the time, no one intended to use Weatherford as a witness in respond-

ent's criminal trial (A. 104, 107), although Strom and Foard recognized that Weatherford might be called (A. 128, 176). Respondent himself described the events that suggest that this decision was not unreasonable (A. 44-45):

> [T]hat May was a rather hectic period of activity for a lot of anti-war activists all over the country. Cambodia had been invaded by Mr. Nixon. There was a widespread response all across the country. * * * [T]he University of South Carolina [was shut down] by vote of the student body * * * to indicate their displeasure with * * * the war * * *. * * * [T]here was a vote * * * to strike classes * * *. [D]uring that time was * * * the killings at Kent State, when four students were shot. The National Guard was on the campus at the University of South Carolina. * * * It was a very high level of emotions at that time * * *. People who had a very definite commitment to oppose the war [in Southeast Asia] were very angered and upset by what was going on, and it was a time of high emotions * * *.

Weatherford had been an undercover agent for approximately a year and had established his "cover" well enough to be able to monitor the "high emotions" from the inside (A. 45). The intelligence Weatherford was able to supply made it more likely that the state officials could take steps to avoid mass confrontations, which sometimes lead to violence. Weatherford could not be replaced on short notice; it had taken him a long time to establish his cover. Respondent himself recognized that Weatherford's

status would have been jeopardized if he had continued to avoid meeting with respondent and his attorney (A. 69).

We do not contend that it was imperative that the State continue to employ Weatherford as an undercover agent; we have pointed out at pages 17-18, *supra*, that the propriety of Weatherford's activities as an agent has not been challenged here except to the extent of his meetings with Wise and his testimony at trial. That being so, the Court must assume, as the district court concluded (A. 250, 253), that the State had a legitimate interest in maintaining Weatherford's cover and was entitled to take reasonable steps to do so.

Weatherford never sought to initiate the meetings with respondent; in fact, he discouraged them by retaining his own attorney and telling respondent that his case would be severed (A. 67, 96, 244). Weatherford testified that both meetings with respondent and his attorney were unanticipated (A. 182-183). Wise testified that he thought an informant was involved (A. 78); it made little difference to the defense whether Weatherford or someone else was the informant (A. 93).

Moreover, there is no indication that Weatherford learned anything useful at the defense discussions. One does not need to be privy to defense strategy discussions to know that the defense case is stronger if the prosecutor does not have any eyewitnesses testifying at trial; yet this (together with the information that the defense did not know that Weatherford was the informant) was the only thing revealed to

Weatherford during the discussions (A. 97-98). The rest of the meetings consisted of Wise's questioning of Weatherford (A. 81). Even the trivial information Weatherford learned was not relayed to Strom, to the prosecutor, or to anyone else (A. 249).[28] It is difficult to see what else Weatherford and Strom could have done to protect respondent's rights, other than to disclose Weatherford's role as an undercover agent.[29] Yet they deemed that avenue to be foreclosed

[28] The court of appeals noted (addressing the issue of damages) that Weatherford, who was "fully acquainted with [respondent's] trial strategy, talked with Solicitor Foard, who prosecuted the case, before trial * * *" (A. 261). That conversation occurred only minutes before the trial and evidently consisted of no more than Foard's indicating to Weatherford the possibility that he might have to call him as a witness (A. 132-133, 192-193). There is no evidence that Weatherford gave valuable information to Foard, and the district court explicitly found (A. 249) that he did not. Nor, of course, is there any evidence that Weatherford was "fully acquainted" with respondent's trial strategy.

[29] One alternative course might have been to postpone arresting respondent for the vandalism of the draft board until Weatherford's usefulness as an undercover agent had been exhausted. This course, too, would have had its dangers; if Weatherford had continued to associate with respondent after the crime and before respondent's arrest, respondent might have claimed that the delay had been arranged in order to produce an advantage for the prosecution (cf. *Hoffa, supra*, 385 U.S. at 309-310). Respondent also might have asserted that the pre-accusation delay violated the Due Process Clause. Cf. *United States* v. *Marion*, 404 U.S. 307, 324-325. Although we believe that a legitimate desire to protect the "cover" of an informant or agent is an adequate reason for delay, a defendant might claim that evidence disappeared during the interim. If expeditious trials are advantageous for defendants, it is

by what they perceived to be the dangerous situation on the university campus. These facts do not bespeak a violation of respondent's right to the effective assistance of counsel.

In sum, this case involves no exercise of governmental power or guile to intrude into secret councils; Weatherford was invited to attend even though the defense suspected there was an informant and had reason to believe he might be the informant (A. 253). This case involves no design on the part of a government agent to observe or hear the defendant's strategy; the defendant made the request, choosing the times, places, and subjects of discussion. This case involves no plan to relay information to the prosecutor; the agent kept what he learned to himself. This case involves no disruption of the defense strategy; the agent did not volunteer misleading information.[30] The agent may have influenced the course of the defense, but that influence depended on the deception inherent in the maintenance of his "cover," not upon his attendance at the meetings with counsel. There was no risk of interference with respondent's ability to consult with counsel and to defend himself,

hard to say whether they would, as a rule, prefer to have their trials postponed (because of pre-accusation delay) or to take the slight chance that confidences will be heard during an exchange with counsel. The Constitution should not be read to compel the State to choose delay rather than the course it followed here.

[30] See A. 253. Respondent contends that Weatherford did volunteer misleading information, but the district court disagreed.

and therefore there was no violation of the Sixth Amendment.

D. If Weatherford's Presence at the Meeting With Counsel Did Not Violate the Sixth Amendment, Then Neither Did His Testimony at Respondent's Trial

The court of appeals held that Weatherford's presence at the meetings with respondent and Wise violated the Sixth Amendment independent of any later events. It is possible to argue, however, that even if Weatherford's mere attendance at the meetings was not improper, he should not thereafter have testified. We submit, however, that his testimony is not open to such a challenge.

1. Weatherford's testimony was not a "fruit" of his attendance at the meetings

If Weatherford had not met with respondent and Wise, there would be no question about the propriety of his testimony, which was wholly concerned with events observed prior to those meetings. Any error in allowing him to testify could come about only because allowing testimony after a prosecution witness has met with defense counsel would somehow confer an unfair advantage on the prosecution. Such an advantage would be likely to occur, we think, only if the agent were allowed to testify about what transpired at the meetings or if it were shown that he had capitalized upon what he learned there.

This argument is consistent with, if it is not required by, this Court's decision in *Hoffa*. While

Hoffa was standing trial for one offense, an informant, Partin, regularly saw Hoffa and participated in discussions with Hoffa's associates. The Court assumed that Partin was engaged in these endeavors at the government's behest, that he took part by invitation in meetings between Hoffa and his attorneys, and that he reported some of what he heard to federal agents. The Court concluded, however, that these overhearings did not affect Partin's testimony at Hoffa's later trial for obstruction of justice and that there was no need to exclude Partin's evidence from that trial. *Hoffa* stands, at a minimum, for the proposition that an informant's presence during a defendant's discussions with his lawyer does not invariably infect the informant's later testimony. The Court assumed in *Hoffa* that Partin's overhearings of the discussions with counsel were improper; it nevertheless held that Partin's testimony was not a fruit of his overhearings and that it therefore was admissible.

If the testimony was admissible in *Hoffa* even on the assumption that the overhearings were improper, it follows directly that Weatherford was entitled to testify at trial, if, as we have argued, the overhearings in this case did not violate the Sixth Amendment.[31] Weatherford's testimony was not in any sense

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[31] The Court assumed *arguendo* that Partin could not have testified at Hoffa's first trial. That assumption was based upon the further assumption that Partin's conduct during the first trial violated the Sixth Amendment. We have argued that no violation took place during Weatherford's meetings with Wise, however, and, if we are right, there would be no reason to bar Weatherford from testifying at any time.

a fruit of what he heard. It was eyewitness testimony describing what he saw during the crime.[32] The district court found that the prosecutor's questions and strategy were not influenced by what went on at the meetings Weatherford had with respondent and Wise, because the prosecutor did not know about these meetings (A. 249-250, 252); the court of appeals did not disagree. Wise had an opportunity to cross-examine Weatherford at respondent's criminal trial, and nothing in this cross-examination suggests that Weatherford's eyewitness testimony was strengthened by what he later heard (A. 234-240). Because Weatherford's testimony was not the fruit of any constitutional violation, it was admissible.[33]

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[32] Weatherford's testimony consisted almost entirely of his eyewitness observations of respondent's participation in the assault on the Selective Service office (A. 225-240). Moreover, there is no indication in this record that respondent and Weatherford had ever disagreed about the facts of the offense. (There is thus no reason to believe that Weatherford's talks with respondent and Wise enabled him to anticipate defense cross-examination on the facts.) Respondent took the stand in his own defense and conceded his involvement in the acts charged, disputing only the State's characterization of his intent as malicious within the meaning of the statute (A. 250).

[33] In cases in which it is alleged that an informant has overheard defense strategy discussions it will, of course, ordinarily be necessary to hold a taint hearing. It may be difficult, in many cases, to determine whether testimony at trial is a fruit of what the informant learned, and courts might properly resolve doubts in favor of defendants. We perceive no reason, however, for a rule that entirely dispenses with such an inquiry, other than as a sanction for governmental misconduct of a kind that was wholly lacking here.

2. *Weatherford's testimony at trial is not an appropriate source of civil liability*

There is an important difference between the argument that Weatherford should not have met with Wise and the argument that Weatherford should not have testified: the former may show a violation of the Sixth Amendment regardless of its effect upon events at trial, but the latter is an assertion that the trial itself was infected by error. The usual remedy for trial error is an objection at trial and, if the objection fails, an appeal. If Weatherford's testimony at trial was a constitutional violation, a timely objection presumably would have prevented any error in allowing him to take the stand. We submit that there is little justification for civil damages liability when a defendant has bypassed the ordinary mechanism for asserting a trial-type right of this sort. At a minimum respondent should not be allowed to complain about damages that are attributable to his failure to mitigate his losses by objecting at trial. Several arguments support this result.

a. Weatherford was called to the stand by Solicitor Foard. Weatherford had no valid privilege to refuse to testify and no reason to believe that, if his testimony would be improper, respondent's attorney would fail to object. Strom, too, was not empowered to countermand Foard's decision. Although Strom evidently did not attempt to dissuade Foard from calling Weatherford, Strom should not be required to anticipate that respondent's attorney would fail to interpose any valid objection. It is particularly difficult to second-

guess Strom's inaction in light of the fact that Strom did not know that Weatherford had met with Wise (A. 248, 251, 255). Solicitor Foard is absolutely immune from damages on account of his actions as a prosecutor (*Imbler* v. *Pachtman*, 424 U.S. 409). No useful purpose could be served by requiring Weatherford or Strom to answer in damages for actions directed by Foard, and for which Foard is immune. Cf. *Doe* v. *McMillan*, 412 U.S. 306, 312-313.

b. Weatherford is absolutely immune from damages for truthful testimony given during a criminal trial, whether or not he was under a compulsion to testify. *Sachs* v. *Stecker*, 60 F.2d 73, 75 (C.A. 2); Harper and James, *The Law of Torts* § 5.22 (1956). Compare *Brawer* v. *Horowitz*, 535 F.2d 830, 836-837 (C.A. 3) (immunity extends even to perjury), with *Hilliard* v. *Williams*, 516 F.2d 1344, 1349-1350 (C.A. 6), certiorari denied, 423 U.S. 1066, (witness may be liable for false or misleading testimony).

c. If respondent has suffered loss at the hands of the State because of a constitutional violation arising from Weatherford's act of testifying, it is only because he should not have been convicted on the basis of such testimony. The Sixth Amendment's guarantees are safeguards ensuring that an accused has assistance in his attempts to understand the case and resist unjust conviction. We doubt that a remedy of money damages should be available when the only claim raised is that the State has adduced improper evidence at trial, at least while the criminal conviction, which necessarily rests upon the assumption that the trial was fair, still stands.

First, to the extent that respondent is arguing that Weatherford should not have testified, his appropriate remedy was to object during his criminal trial, to move to strike the testimony, or to move for a mistrial. He did none of these things. Nor did he appeal. Under these circumstances an excellent argument could be made that, if respondent had a right not to have Weatherford testify, it was a "trial type" right that was bypassed when not raised at trial. See *Estelle* v. *Williams*, No. 74-676, decided May 3, 1976.

Second, it is far from certain that respondent can use a damages action under 42 U.S.C. 1983 to make what amounts to a collateral attack on the criminal proceedings in which he was convicted.[34] See *Guerro* v. *Mulhearn*, 498 F.2d 1249 (C.A. 1); *Martin* v. *Merola*, 532 F.2d 191 (C.A. 2). The propriety of Weatherford's testimony could have been put at issue in respondent's criminal trial. He failed to put it at issue, and collateral estoppel therefore may preclude his litigation of the question in this civil suit. Moreover, the State's very right to try respondent on the criminal charge was at least implicitly at issue in the criminal trial. To the extent respondent now argues that Weatherford's activities (whether by testifying or by simply attending the meetings) un-

[34] Cf. *Preiser* v. *Rodriguez*, 411 U.S. 475, which holds that Section 1983 cannot be used to attack the very fact or duration of confinement. This principle does not apply here directly, for respondent is no longer incarcerated.

dermined the prosecution itself, collateral estoppel is a bar to this action for damages. See *Mastracchio* v. *Ricci*, 498 F.2d 1257 (C.A. 1); *Cardillo* v. *Zyla*, 486 F.2d 473 (C.A. 1); *Scoggin* v. *Schrunk*, 522 F.2d 436 (C.A. 9). Cf. *Ellis* v. *Dyson*, 421 U.S. 426, 440-441 n. 6, 442-443 (Powell, J., dissenting).

d. We do not explore these arguments further, however, for they were not raised below and have not been presented in the petition for a writ of certiorari. The Court therefore need not consider them. *Radzanower* v. *Touche Ross & Co.*, No. 75-268, decided June 7, 1976, slip op. 3 n. 3; *Tennessee* v. *Dunlap*, No. 75-95, decided June 10, 1976, slip op. 5 n. 3. We mention them because it should be clear that a decision in favor of respondent on the questions presented here need not lead to judgment in his favor on remand.

II

THE CONSTITUTION DOES NOT REQUIRE THE PROSECUTION TO DISCLOSE BEFORE TRIAL THE IDENTITIES OF UNDERCOVER AGENTS WHO WILL TESTIFY

The court of appeals held that petitioners violated the Due Process Clause of the Fifth and Fourteenth Amendments by failing to disclose in advance of respondent's criminal trial that Weatherford was an agent and would testify for the prosecution (A. 261-262). The court relied for this proposition on *Brady* v. *Maryland*, 373 U.S. 83, reasoning that by permitting Weatherford to conceal his identity and "deny up through the day before his appearance at trial that he [would] testify against the defendant," then "testify with devastating effect," the prosecution had "lull[ed]" respondent "into a false sense of security and thus den[ied] him the opportunity (1) to consider whether plea bargaining might be the best course, (2) to do a background check on Weatherford for purposes of cross examination, and (3) to attempt to counter the devastating impact of eyewitness identification" (A. 262).

The court did not link this holding to its prior conclusion that the prosecution had deprived respondent of the effective assistance of counsel. Nor is there any logical connection between the two issues; the "lulling" and the "false sense of security" were attributable to the fact that respondent did not know the strength of the prosecution's case, and to the deception necessary to maintain Weatherford's cover, rather than to any governmental knowledge about respondent's preparations for trial. The court of appeals therefore necessarily has held that the government must disclose before trial the names of its "devastating" witnesses, if not all of its "devastating" evidence, or it will jeopardize the conviction and expose its witnesses to personal liability.

No decision of this Court supports this revolutionary rule. *Brady*, upon which the court of appeals relied, requires only the disclosure of certain evidence *favorable* to the defense. The fact that Weatherford would testify for the prosecution was hardly

evidence favorable to the defense; it was "devastating" precisely because it was strong evidence of guilt. Thus, the court of appeals has held that the prosecution must give the defendant pretrial notice of the important evidence that will support the charge; but "it has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge." *United States* v. *Agurs*, No. 75-491, decided June 24, 1976, slip op. 14 n. 20. Even when the Constitution requires the prosecution to disclose information, it does not require the disclosure to occur before trial (*ibid.*).[35]

It has been a fixed rule of our jurisprudence that neither the prosecution nor the defense need expose its case or its evidence to the other in advance of trial. "Discovery in criminal cases is a recent * * * development." Wright, *Federal Practice and Procedure: Criminal* § 251 (1969). In 1944, when the Advisory Committee proposed Fed. R. Crim. P. 16, it was able to write that it was "doubtful" whether existing law allowed *any* discovery in criminal cases. In 1953 Chief Justice Vanderbilt of the Supreme Court of New Jersey, who had been Chairman of the Advisory Committee, wrote a strong opinion arguing against the desirability of discovery in criminal cases

[35] See also *United States* v. *Acosta*, 526 F.2d 670 (C.A. 5), and *United States* v. *Miller*, 529 F.2d 1125, 1128 (C.A. 9), which discuss in some detail why the Constitution does not require pretrial disclosure even of evidence favorable to the defendant.

and questioning the wisdom of judicial innovations in the field. *State* v. *Tune*, 13 N.J. 203, 98 A.2d 881.

The development of criminal discovery has been almost entirely a legislative or rulemaking process, and courts have played little or no role in it.[36] No statute or rule in South Carolina required the prosecutor to disclose in advance of trial Weatherford's status, or the fact that he would testify. Nor is there such a rule in the federal courts. The Advisory Committee's proposed amendment to Rule 16 in 1974, as originally promulgated by this Court, would have required the prosecution (and the defense) to disclose the names of witnesses in most cases (see 18 U.S.C. (Supp. V) pp. 1318-1319), but Congress deleted this proposed revision. The Conference Committee report (see *id.* at 1322) stated: "A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contact directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy."

[36] Recently, some courts have suggested that the judiciary has an "inherent power" to order discovery against the government, despite the lack of a rule or statute. See, *e.g.*, *United States* v. *Cannone*, 528 F.2d 296 (C.A. 2) (*dictum*). Contra, *United States* v. *Conder*, 423 F.2d 904 (C.A. 6), certiorari denied *sub nom. Pegram* v. *United States*, 400 U.S. 958. We think that *Cannone* cuts against a long history that cannot be so easily overlooked.

There is no reason to interpret the Due Process Clause to override this time-tested policy,[37] to discard the process of legislative experimentation, and to erect a presumption in favor of disclosure before trial. As Mr. Justice Holmes put it, "[i]f a thing has been practiced for 200 years by common consent, it will need a strong case" for the Constitution to upset it now. *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31. There is no "strong case" for the Constitution to

[37] Although there has been debate concerning the power of the federal courts to order the prosecutor to disclose before trial the names of its expected witnesses, there has heretofore been no suggestion of any prosecutorial duty of disclosure in the absence of a court order. *United States* v. *Cannone, supra,* which indicated that district courts have such power, nevertheless reversed a disclosure order, concluding that the government's interests in avoiding disclosure usually outweigh the defendant's interests in obtaining disclosure (528 F.2d at 301-302). In cases in which the district court has denied a pretrial request by the defense for disclosure (surely a more compelling situation than that presented here, where there was no request), the courts of appeals have consistently affirmed convictions on the ground that the defendant has no general right to such information except in capital cases, where it is created by statute. See, *e.g., United States* v. *Bolden,* 514 F.2d 1301, 1312 (C.A.D.C.); *United States* v. *Payseur,* 501 F.2d 966, 972 (C.A. 9); *United States* v. *Massingale,* 500 F.2d 1224 (C.A. 4); *United States* v. *Verse,* 490 F.2d 280, 282 (C.A. 7), certiorari denied, 416 U.S. 989; *United States* v. *White,* 450 F.2d 264, 268 n. 6 (C.A. 5); *United States* v. *Harflinger,* 436 F.2d 928, 936 (C.A. 8), certiorari denied, 402 U.S. 973. Cf. *United States* v. *Nakaladski,* 481 F.2d 289, 297 n. 5 (C.A. 5), certiorari denied *sub nom. Coco* v. *United States,* 414 U.S. 1064; *United States* v. *Murphy,* 480 F.2d 256, 259 (C.A. 1), certiorari denied, 414 U.S. 912; *United States* v. *Jordan,* 466 F.2d 99, 101-102 (C.A. 4).

upset the practice of non-disclosure of the names of prosecution witnesses.

The pros and cons of pretrial disclosure of the identity of witnesses in criminal cases have been and should remain a matter for determination by the legislative authority. Three years ago the Court wrote that "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded" (*Wardius* v. *Oregon,* 412 U.S. 470, 474), and that the Due Process Clause does not require a State to adopt reciprocal pretrial discovery devices (*id.* at 475). The court of appeals has not proffered sufficient reasons to support a contrary view.

The government's constitutional duty to disclose under the *Brady* line of cases rests upon the proposition that a trial is fundamentally unfair if conducted while the defendant is ignorant of material exculpatory evidence known to the prosecutor, and the prosecutor has violated a duty to disclose that evidence. See generally *United States* v. *Agurs, supra.* The court of appeals did not suggest that Solicitor Foard violated any duty to respond to a request by the defense for exculpatory evidence; there was no defense request of any kind, Weatherford's testimony and identity were not exculpatory, and, of course, they were not withheld during trial.

The court of appeals' reasoning leads directly to a requirement that the prosecution open its files in advance of trial. Only with all of the prosecution's evidence in front of it could an accused "consider

whether plea bargaining might be the best course;" [38] only with the names of all the prosecution's witnesses in front of it could the defense "do a background check" on each; [39] only with all of the prosecution's evidence in front of it could the defense have more time to "attempt to counter [its] devastating impact." This Court has long recognized, however, that important considerations—including preservation of the traditional adversary system, prevention of manu-

[38] The court of appeals' argument with respect to plea bargaining is also wide of the mark because an accused has no constitutional complaint if the prosecution simply rebuffs all requests to bargain. See generally the Advisory Committee's commentary on Fed. R. Crim. P. 11(e) and *United States* v. *Werker*, 535 F.2d 198 (C.A. 2). Solicitor Foard could have refused to bargain, and it therefore cannot be a violation of the Constitution that the prosecution's tactics simply made a plea arrangement less likely.

[39] There is some irony in the court of appeals' argument that the prosecutor's decision to use Weatherford as a witness denied respondent and his attorney the opportunity to investigate Weatherford and his story. The first meeting between Weatherford and Wise—a meeting that the court of appeals found violated the Sixth Amendment—was devoted primarily to Wise's attempts to find out about Weatherford's observations and background. See A. 81, 249, 252.

Moreover, Wise had an opportunity at the criminal trial to cross-examine Weatherford about his background and declined to do so. No evidence has subsequently been discovered that could have been used to impeach Weatherford's testimony. After the criminal trial Wise learned, "simply [by] talking to people" (A. 94), that Weatherford may have been arrested on a narcotics charge (cf. A. 90). But at the civil trial Weatherford testified that he had not been arrested other than as part of his undercover activities (A. 189), and respondent has not produced any evidence to cast doubt upon this testimony.

factured defenses, and forestalling threats to and subornation of potential witnesses—militate against a system of pretrial disclosure of the prosecution's case. "[T]here is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor" (*United States* v. *Agurs*, *supra*, slip op. 9).

The considerations invoked by the court of appeals show no more than that surprise may have its effects. It can be debated how "surprising" Weatherford's testimony was to the defense; the district court concluded that the defense had cause to suspect all along that Weatherford was an informant (A. 253). The defense was not unaware of Weatherford's existence; respondent knew that he was an eyewitness, Wise had interviewed him, and the only uncertainty was whether he would testify. But however that may be, a claim of genuine surprise would merit at most a continuance. Perhaps it would have been an abuse of discretion for the state court to have denied a request by respondent for a continuance of his criminal trial in these circumstances, but his counsel never requested a continuance, and there was no appeal. It is mystifying how these events can give rise to a constitutional claim for money damages.

We also submit that the court of appeals has selected the wrong remedy, even assuming that it correctly held that Weatherford's status as an agent and potential witness should have been disclosed in advance of trial. There has been no showing of improper motive; it appears to be unquestioned that the prose-

cutor did not decide until the morning the trial began that he would use Weatherford as a witness (A. 249-250). The arguments we have made at pages 49-52, *supra*, apply with special force to the decision to call Weatherford as a witness. The decision was made by Solicitor Foard, not by Weatherford or Strom, and no purpose could be served by requiring Weatherford or Strom to respond in damages for the acts of Foard. The right at stake—the right to a fair trial—is one that ordinarily must be vindicated through the trial and appellate process. A defendant should not be allowed to make no objection, bypass his appeal, and then complain years later that decisions of the prosecutor and other governmental personnel so infected the trial with unfairness that a monetary remedy is appropriate. If the Court rejects our submission that there was no unfairness here, we submit that it should remand the case to the court of appeals for further consideration of these arguments.[40]

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[40] The third question presented by petitioners (Pet. 2) concerns the liability of Chief Strom, Weatherford's superior officer. The court of appeals' decision on this question appears to involve primarily the facts of this case rather than any disputed legal principle, and we therefore do not address the matter at length. If our argument that none of Weatherford's acts violated the Constitution is correct, then the court of appeals' judgment must be reversed as to Strom as well.

Even if Weatherford's acts (or those of Solicitor Foard) violated the rights of respondent, however, there is no reason to impute these acts to Strom. Cf. *Rizzo* v. *Goode*, 423 U.S. 362, 371, 376-377. If *respondeat superior* applied in actions under 42 U.S.C. 1983 (a question on which we express no opinion), it would not lead to liability for Strom. The doctrine requires the employer of an employee to answer for the employee's acts. However, Strom was not Weatherford's employer, but simply his supervisor.

The court of appeals appeared to conclude that Strom's liability rested upon his failure to prevent Weatherford's acts (A. 262-263). Although we agree with the court of appeals that this may in special cases be an adequate basis of personal responsibility (cf. *United States* v. *Park*, 421 U.S. 658, 670-673), we believe that this principle does not support Strom's liability in this case. Strom did no more than allow Weatherford to continue acting undercover. He did not know that Weatheford had participated in meetings with respondent and Wise, and he was not responsible for Solicitor Foard's decision to call Weatherford as a witness (A. 106, 131, 247-251). Even the court of appeals concluded that there was "no evidence of Strom's direct personal supervision of" Weatherford's undercover activities (A. 258). The most that can be said is that Strom did not attempt to prevent Foard and Weatherford from acting as they did; unless the Constitution creates a duty to act in these circumstances, Strom cannot be liable for his inaction. Cf. *Sims* v. *Adams*, 537 F.2d 829 (C.A. 5).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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